

Docketed:
May 30, 1979

Entry Date

Proceedings and Orders

Entry Date	Proceedings and Orders
May 30 1979	Motion for leave to file and bill of complaint filed.
May 30 1979	Motion for leave to file, complaint & memorandum in support filed.
Jun 1 1979	Motion to expedite filed. (NP).
Jun 8 1979	Memorandum of the State of Alaska filed.
Jun 12 1979	DISTRIBUTED. June 14, 1979. (Above Motion).
Jun 18 1979	The motion for leave to file a bill of complaint is GRANTED and defendants shall have 60 days to answer.
Jul 30 1979	Application for an order extending time to file answer to bill of complaint until September 4, 1979. (Rehnquist, J., July 31, 1979).
Sep 14 1979	Answer to bill of complaint and motion for leave to file counterclaim filed.
Nov 14 1979	DISTRIBUTED. November 30, 1979. (Above Answer to bill of complaint and motion for leave to file counterclaim).
Dec 14 1979	Memorandum of the United States in response to Alaska's motion for leave to file counterclaim and answer to counterclaim filed.
Feb 19 1980	It is ordered that J. Keith Mann, Esquire of Stanford, California, is appointed Special Master.
Feb 26 1980	REDISTRIBUTED. February 29, 1980. (Answer to bill of complaint and motion for leave to file counterclaim.
Mar 3 1980	The motion for leave to file a counterclaim is referred to the Special Master.
Apr 3 1980	Oath of the Special Master filed.
May 19 1980	Motion of Inupiat Community of the Arctic Slope for leave to intervene filed.
May 20 1980	DISTRIBUTED. June 4, 1980. (Above motion).
Jun 8 1981	The motion of Inupiat Community of the Arctic Slope for leave to intervene is referred to the Special Master.
Jan 13 1984	Report of the Special Master on motion of Inupiat Community of the Arctic Slope, et al. for leave to intervene received.
Jan 18 1984	DISTRIBUTED. February 17, 1984. (Above report of the Special Master).
Feb 21 1984	The Report of the Special Master on motion to Inupiat Community of the Arctic Slope, et al. for leave to intervene is recieved and ordered filed.
Nov 27 1985	Interim compensation by Special Master recieved.
Dec 4 1985	DISTRIBUTED. December 6, 1985 (Motion of the Special Master for interim compensation).
Jan 13 1986	The application of the Special Master for award of interim compensation is granted and the Special Master is awarded interim compensation in the amount of \$75,000 to be paid by the State of Alaska and the United States in equal portions.

Entry	Date	Proceedings and Orders
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Oct 4 1993	Letter of Special Master filed. (NP)
Oct 28 1993	Letter of Alaska filed. (NP)
Oct 28 1993	DISTRIBUTED. October 29, 1993.
Mar 11 1994	Draft Report of the Special Master on last substantive section (and map lodged) received.
Mar 23 1994	DISTRIBUTED. April 15, 1994 (Page 4)
Apr 22 1996	Report of the Special Master received.
May 20 1996	ORDER: The Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, not to exceed 75 pages, may be filed within 75 days. Replies, if any, not to exceed 75 pages, may be filed within 60 days after receipt of the other party's exceptions. Sur-reply briefs, not to exceed 30 pages, may be filed within 30 days after receipt of the other party's reply.
Jul 23 1996	RECORD RECEIVED.
Aug 5 1996	Exception of the United States to Report of Special Master filed.
Aug 5 1996	Exceptions of Alaska to Report of Special Master filed.
Oct 8 1996	Brief of United States in opposition to Exceptions of Alaska filed.
Oct 10 1996	Reply brief of Alaska filed.
Oct 10 1996	Brief amici curiae of Alabama, et al. filed.
Oct 28 1996	Motion of Alaska for additional time for oral argument filed.
Oct 28 1996	Motion of California for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 7 1996	Memorandum of the United States to motion of Alaska for additional time for oral argument and to motion of California for leave to participate in oral argument as amicus curiae.
Nov 12 1996	Motion of Wilderness Society, et al., for leave to file a brief as amici curiae filed.
Nov 12 1996	Sur-reply brief of United States filed.
Nov 13 1996	Lodging by State of Alaska filed. (NP)
Nov 13 1996	Surreply brief of Alaska filed.
Nov 20 1996	Exceptions and replies and motion of Wilderness Society for leave to file a brief as amicus curiae DISTRIBUTED (Dec. 6, 1996 Conference)
Nov 26 1996	Opposition of Alaska to motion of Wilderness Society, et al., for leave to file a brief as amici curiae filed and distributed (NP).
Dec 6 1996	Exceptions to the Report of the Special Master are set for oral argument in due course. The motion of Wilderness Society, et al. for leave to file a brief as amici curiae is GRANTED.
Dec 16 1996	Motion of Alaska for additional time for oral argument GRANTED. Thirty additional minutes are allotted for this purpose.
Dec 16 1996	Motion of California for leave to participate in oral

Entry	Date	Proceedings and Orders
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Dec 16 1996	argument as amicus curiae and for divided argument DENIED. ORDER: Motion of Alaska for additional time for oral argument is granted and 30 additional minutes are allotted for that purpose. The motion of California for leave to participate in oral argument as amicus curiae and for divided argument is denied.
Jan 8 1997	CIRCULATED.
Feb 24 1997	ARGUED.

AUG - 5 1996

OFFICE OF THE CLERK

No. 84, Original

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

**ON EXCEPTIONS TO THE REPORT OF THE
SPECIAL MASTER**

**EXCEPTION OF THE UNITED STATES AND
BRIEF FOR THE UNITED STATES
IN SUPPORT OF EXCEPTION**

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 84, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

**ON EXCEPTIONS TO THE REPORT OF THE
SPECIAL MASTER**

EXCEPTION OF THE UNITED STATES

The United States excepts to the recommendation of the Special Master that the application for withdrawal and creation of the Arctic Wildlife Range did not effectively withhold offshore submerged lands from the State of Alaska (Question 9).

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 84, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

**ON EXCEPTIONS TO THE REPORT OF THE
SPECIAL MASTER**

**BRIEF FOR THE UNITED STATES
IN SUPPORT OF EXCEPTION**

JURISDICTION

The Court granted the United States' motion for leave to file a complaint on June 18, 1979. 442 U.S. 937. The Court received the Report of the Special Master and ordered it filed on May 20, 1996. 116 S. Ct. 1823. The jurisdiction of this Court rests on Article III, Section 2, Clause 2, of the Constitution and 28 U.S.C. 1251(b)(2).

TREATY AND STATUTES INVOLVED

Relevant provisions of the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), and the Submerged Lands Act,

43 U.S.C. 1301 *et seq.*, are set out in the appendix to this brief.

STATEMENT

This original action presents a dispute between the United States and the State of Alaska over the ownership of lands beneath the tidal waters along the Arctic coast of Alaska. The action involves a matter of great practical importance, because its resolution will determine, among other things: (1) whether the Court will adhere to its past decisions in determining the location of coastlines; (2) whether the United States or Alaska owns the coastal submerged lands that are integral parts of the National Petroleum Reserve and the Arctic National Wildlife Refuge, the two major federal reservations along Alaska's North Slope; and (3) whether more than \$1.4 billion in oil and gas revenues from the disputed lands will be shared by the citizens of the United States as a whole or by the citizens exclusively of the State of Alaska.

The Court's Special Master, J. Keith Mann, has prepared a Report that comprehensively describes the dispute. The Special Master's Report includes his recommended resolution of fifteen issues that were put forward by the parties. As the Master explains, the rights of the United States and the State of Alaska depend primarily on the application of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which, as a general matter, grants Alaska unreserved lands beneath tidal waters to a distance of three miles from the State's coastline, but retains for the United States the rights over resources of the continental shelf beyond the three-mile limit. The United States and Alaska are in disagreement over a number of

specific issues that fall into two general categories: (1) the location of the coastline from which the three-mile belt is measured; and (2) the extent to which the United States has reserved submerged lands from the operation of the Act. See Report 3.

A. Procedural History

The United States commenced this action on May 30, 1979, by filing a motion with this Court requesting leave to file a bill of complaint against the State of Alaska. Alaska did not oppose the United States' motion, and the Court granted the United States leave to file its complaint. See 442 U.S. 937 (1979). Alaska submitted an answer and filed a motion for leave to file a counterclaim. The Court appointed a Special Master, 444 U.S. 1065 (1980), and referred the State's motion to him, 445 U.S. 914 (1980). Report 3-4.

Through a series of hearings, the Master identified fifteen specific questions for his resolution. See Master's Report 7-8, 509-511. He resolved the first of those questions—whether Alaska should be allowed to file its unopposed counterclaim—by concluding, in accordance with the joint wishes of the parties, that he should resolve the matters raised in the counterclaim, “subject, of course, to this Court's ultimate ruling.” *Id.* at 5-7. He divided the remaining fourteen questions into three groups for purposes of trial and decision. See *id.* at 10-11. Those groups are: (a) the Alaska coastline issues (Questions 2, 3, 4, 5, 6, 12, 13, 14, and 15); (b) the National Petroleum Reserve issues (Questions 7, 8, and 11); and (c) the Arctic National Wildlife Refuge issues (Questions 9 and 10). See *id.* at 503-504.

During the proceedings, the Inupiat Community of the Arctic Slope and the Ukpeagvik Inupiat Corpora-

tion sought to intervene in the case, claiming rights in some of the geographic areas in dispute. The Master concluded that they should be allowed to intervene, subject to several restrictions, including a requirement that they credibly demonstrate an interest in the areas. As a result of the outcome of other litigation, the intervenors ceased to satisfy that requirement, and the Master issued an order dismissing them from further participation. See Report 8-9.

The Master conducted evidentiary hearings in July 1980, July through August 1984, and May through June 1985. Report 10-11. He received extensive post-trial briefing on the issues, including the relevance of certain recent decisions of this Court. *Ibid.* Beginning in 1989, as the Master completed sections of his Report, he submitted them to counsel, under an order of confidentiality, for technical review and comment. *Id.* at 11-12. The Master submitted his final Report to the Court in March 1996.

B. Overview of the Special Master's Recommendations

The Special Master's Report comprehensively addresses the issues under three general topic headings: (1) the Alaska Coastline (Report 13-340); (2) Federal Reservations (*id.* at 341-499); and (3) Summary of Recommendations (*id.* at 501-505). The United States excepts from one of the Master's recommendations. Specifically, the United States contends that the Master is mistaken in concluding that the application of the Department of the Interior's Bureau of Sport Fisheries and Wildlife for withdrawal and creation of the Arctic Wildlife Range did not effectively withhold offshore submerged lands therein from the State of Alaska. To place the overall case

and the United States' exception in context, we provide the following overview of the Special Master's recommendations.

1. The Alaska Coastline

The largest portion of the Special Master's Report is devoted to disputes involving the location of Alaska's coastline. The Report provides a summary of the relevant legal principles (Report 15-18) and then explains how those principles apply to the issues (*id.* at 19-340). Those issues are:

Whether or to what extent should the existence of barrier islands affect the location of the coastline. Report 19-175 (Questions 2, 3, 4, 12, 13).

Whether Southern Harrison Bay is a "juridical bay." Report 176-226 (Question 15).

Whether a formation known as Dinkum Sands is an island. Report 227-310 (Question 5).

Whether the ARCO pier (an extension of an existing dock facility at the west side of Prudhoe Bay) is a part of the mainland for purposes of the Submerged Lands Act. Report 311-337 (Question 6).

Whether certain physical features should be deemed low-tide elevations. Report 338-340 (Question 14).

a. *Legal Background (Report 15-18).* The Constitution provides for the admission of new States to the Union. U.S. Const. Art. IV, § 3, Cl. 1. This Court has held that new States are admitted on an "equal footing" with the original thirteen colonies. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-229 (1845). Under the Equal Footing Doctrine, a newly admitted

State presumptively succeeds to the United States' ownership of tidelands (viz., coastal lands between high and low tide) and lands beneath inland navigable waters within the State's boundaries. *Ibid.*; see *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *Shively v. Bowlby*, 152 U.S. 1, 26-31 (1894).

The Equal Footing Doctrine does not extend, however, beyond a State's coastline. *United States v. California*, 332 U.S. 19 (1947). As this Court has explained, the original thirteen colonies had no right to lands seaward of the coastline, and the newly created States accordingly cannot claim them on an "equal footing" rationale. *Id.* at 30-33. The United States, through the exercise of its national powers, acquired paramount sovereign rights in the coastal lands seaward of the low-water line. *Id.* at 33-36. Hence, the United States presumptively retains title to the lands beneath an internationally recognized belt of coastal waters, which is known as the marginal or territorial sea. *Ibid.*

Congress has exercised the United States' paramount power over the territorial sea by, among other things, enacting legislation known as the Submerged Lands Act, ch. 65, 67 Stat. 29 (1953), 43 U.S.C. 1301 *et seq.* The Submerged Lands Act grants the coastal States title to a specified measure of submerged land seaward of the coastline, subject to certain important exceptions. See 43 U.S.C. 1311-1314. The Alaska Statehood Act expressly provides that the Submerged Lands Act applies to Alaska. See Pub. L. No. 85-508, § 6(m), 72 Stat. 343 (1958). Accordingly, Alaska is generally entitled to submerged lands extending three miles seaward of its coastline. 43 U.S.C. 1301(a)(2) and (b). The Act defines the term "coast line" as "the line of ordinary low water along that

portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. 1301(c).

The Submerged Lands Act does not expressly address all of the questions that might arise in locating a coastline, including, for example, the definition of "inland waters." In those cases in which the Submerged Lands Act does not provide explicit guidance, this Court has relied on the definitions and principles contained in the Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606 (hereinafter the Convention). See *United States v. California*, 381 U.S. 139, 165 (1965). Hence, the Master considered both the Submerged Lands Act and the Convention in formulating his recommendations. See Report 15-18.

b. *The Effect of Islands on the Coastline* (Report 19-175). A State's rights to submerged lands may be affected by the presence of islands near the mainland. The United States and Alaska disagree as to the precise effect. The issue has primary practical importance in the so-called "Leased Area," which is located between two federal reservations that are currently known as the National Petroleum Reserve in Alaska and the Arctic National Wildlife Refuge. See Report 19; see also *id.* at 2-3 (Fig. 1.1, showing the location of the Leased Area).

As the Master explained, the United States offered a "single theory" about how the Submerged Lands Act and the Convention should be applied to the northern coast of Alaska. Report 20. Under that theory, the seaward limit of Alaska's submerged lands is defined by a line that is at every point three miles from the coastline of the Alaskan mainland and barrier islands. See *id.* at 21-23 & Fig. 3.1. That approach

relies directly on the application of Articles 3, 5, 6, and 10 of the Convention. *Ibid.* See 15 U.S.T. 1608-1610. Figure 3.2 of the Master's Report shows the result that is produced in the "Leased Area." See Report 24.

Alaska argued for the application of several different theories in determining the seaward limit of its submerged lands in the vicinity of barrier islands. But as its principal argument, Alaska contended that the coastline should be constructed by drawing imaginary lines, known as "straight baselines," up to ten miles long, between the barrier islands. Report 25-28 & Fig. 3.3. Article 4 of the Convention identifies the "straight baseline" approach as an optional method that is available under certain circumstances for constructing a coastline. *Ibid.* See 15 U.S.T. 1608. Figure 3.4 of the Master's Report shows the result that Alaska's approach would produce in the "Leased Area." See Report 28. Alaska suggested two alternative approaches, which would define specified areas as inland or assimilated waters, in the event that its "straight baseline" approach was rejected. See *id.* at 29-32.

The Special Master exhaustively examined the competing arguments of the United States and Alaska and ultimately ruled in favor of the United States on all of the questions concerning the effect of islands on the coastline. Report 32-175. He stated:

I conclude that the general rules are much as the United States claims. Under these rules, the normal baseline provisions of the Convention would be controlling, with results as shown in figures 3.1 and 3.2.

Id. at 34. See *id.* at 34-44. The Master then examined "whether any exception to the general rules applies." *Id.* at 34. He specifically concluded that the use of straight baselines would be impermissible unless Alaska were able to show, at a minimum, that "the United States' present position represents a contraction of territory, compared to its position at the relevant time or times in the past." *Id.* at 49. See *id.* at 46-48; *United States v. Louisiana*, 394 U.S. 11, 72-74 & n.97 (1969); *California*, 381 U.S. at 167-169.

The Master comprehensively evaluated the past delimitation practice of the United States, Report 52-170, and concluded that "[t]his is not a situation in which the United States has created a contraction of Alaska's recognized territory in the Arctic," *id.* at 169. In addition, the Master stated that "Alaska's position is again hard to justify in terms of fairness," *id.* at 173, noting that Alaska sought to be put "on a better than equal footing with the older states," *id.* at 174. The Master accordingly ruled against Alaska on its straight baseline arguments, as well as its alternative claims. *Id.* at 174-175.

c. *Southern Harrison Bay* (Report 176-226). The Submerged Lands Act recognizes that a State is generally entitled to submerged lands beneath inland waters, including what are known as "juridical bays." Report 176; see 43 U.S.C. 1311(a). Under the Act, the seaward limit or "closing line" of a bay is treated as a part of the coastline for purposes of determining the grant to a State of submerged lands beneath the adjoining territorial sea. See Report 176; 43 U.S.C. 1301(c). Article 7 of the Convention provides criteria for drawing the closing lines of juridical bays. See 15 U.S.T. 1609.

The United States and Alaska agreed that portions of Harrison Bay, which lies west of the Leased Area and adjacent to the National Petroleum Reserve, are juridical bays that embrace inland waters. They also agreed that closing lines for Harrison Bay must be drawn in accordance with Article 7 of the Convention, 15 U.S.T. 1609. Report 176-177. They further agreed to a closing line for the northern portion of Harrison Bay. But they disagreed over the proper interpretation of Article 7 and its application to the southern portion of Harrison Bay. *Id.* at 176-180.

The United States contended that paragraph 2 of Article 7 does not recognize a coastal indentation as a juridical bay unless it both is "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters" and has an area "as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." Art. 7(2), 15 U.S.T. 1609. See Report 181-182. The United States submitted that, under those tests, a separate closing line should be drawn across each of the mouths of the two heads of southern Harrison Bay. See *id.* at 179 (Fig. 4.2). Alaska argued that the former test is simply a description of the latter and that a bay satisfies paragraph 2 if it satisfies the semi-circle test. *Id.* at 182. Alaska claimed that, under that test, all of southern Harrison Bay should be encompassed within a single closing line. See *id.* at 179 (Fig. 4.2).

The Master concluded, based on decisions of this Court and the drafting history of the Convention, that a coastal indentation does not qualify as a bay unless it satisfies both tests set out in Article 7(2) of the Convention. Report 182-199. See *United States v. Maine*, 469 U.S. 504, 514 (1985); *Louisiana*, 394 U.S.

at 48 n.64, 54. The Master nevertheless determined that all of southern Harrison Bay satisfied those tests. He rejected the United States' view that two closing lines should be drawn across the separate mouths of southern Harrison Bay and recommended instead that the Court adopt a single closing in accordance with Alaska's position. Report 199-226. See *id.* at 179 (Fig. 4.2).

d. *Dinkum Sands* (Report 227-310). As explained above, under the Submerged Lands Act, the grant to Alaska of offshore submerged lands includes those lands within three miles of the coastline of either the mainland or offshore islands. See pages 5-8, *supra*. The United States and Alaska agreed that the question whether a formation is an island is controlled by Article 10(1) of the Convention, which defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." 15 U.S.T. 1609. The United States and Alaska disagreed over whether a small formation known as Dinkum Sands, which lies within the Leased Area between the Midway and McClure Islands, is an island constituting part of Alaska's coastline for purposes of delimiting Alaska's offshore submerged lands. Report 227-230.

The Master conducted a thorough review of all evidence relevant to the question whether Dinkum Sands is an island. Report 230-310. He analyzed historic hydrographic and cartographic evidence (*id.* at 234-248), the results of a joint monitoring project conducted by the parties to determine the level of mean high water at Dinkum Sands and the elevation of Dinkum Sands itself (*id.* at 248-269), and additional observations conducted after the completion of the joint monitoring project (*id.* at 276-283). He also con-

sidered the physical composition of Dinkum Sands (*id.* at 269-275), its creation through coastal processes (*id.* at 283-287), and the permanence or impermanence of its physical features (*id.* at 287-307).

The Special Master ultimately concluded that Article 10 "requires an island to be 'above water at high tide' at least 'generally,' 'normally,' or 'usually,'" and that "a feature does not meet the standard if it frequently slumps below the high-water datum." Report 309. The Master found that "Dinkum Sands is frequently below mean high water and therefore does not meet the standard for an island." *Ibid.*

e. *The Arco Pier Extension (Report 311-337)*. The Submerged Lands Act's grant of offshore submerged land may be affected by the construction of permanent harbor works. Article 3 of the Convention provides that "the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast." 15 U.S.T. 1608. Article 8 of the Convention additionally states that "the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." 15 U.S.T. 1609. See *Louisiana*, 394 U.S. at 40 n.48; *California*, 381 U.S. at 176-177. The United States and Alaska disputed whether the private extension of the so-called ARCO pier at the west side of Prudhoe Bay should be treated as part of the coastline for purposes of determining Alaska's submerged lands grant. Report 311-313.

The United States has recognized that permanent harborworks possessing a low-water line may extend a State's coastline. The United States, through the Army Corps of Engineers, pervasively regulates construction in navigable waters, see *Rivers and Harbors Appropriation Act of 1899*, 33 U.S.C. 401 *et seq.*

The United States may prevent an extension such as the ARCO pier by declining to issue a construction permit unless the State disclaims any change in its rights under the Submerged Lands Act as a consequence of the extension. See *United States v. Alaska*, 503 U.S. 569 (1992). The United States did not obtain such a waiver when, in 1976, it authorized a private oil company to construct a 5605-foot extension of the existing ARCO pier. The United States nevertheless urged that the extension should not be treated as a part of the mainland because of exceptional circumstances surrounding its construction. Report 311-313.

The Master rejected the United States' arguments. He concluded that the pier extension is a permanent harbor work possessing a low-water line. Report 316-323. He also concluded that the Army Corps of Engineers' grant of the construction permit under "an emergency situation" did not excuse its failure to obtain a state disclaimer. *Id.* at 323-329. He similarly concluded that the Corps' alleged failure to adhere to its own regulations did not prevent the extension of the coastline. *Id.* at 329-337. The Master noted that "the lands in question are not irrevocably lost to the United States, for all agree that the Corps of Engineers can restore the coastline by ordering removal of the pier extension." *Id.* at 337.

f. *Low-Tide Elevations (Report 338-340)*. Article 11(1) of the Convention provides that a "low-tide elevation"—viz., "a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide"—creates a belt of territorial sea if it is within a prescribed distance of "the mainland or an island." 15 U.S.T. 1610. This Court has applied Article 11 in determining a State's

entitlement to submerged lands under the Submerged Lands Act. *Louisiana*, 394 U.S. at 40-47. Alaska argued that six features in the Beaufort Sea qualified as low-tide elevations that extended the grant of submerged lands to Alaska. The United States and Alaska resolved that issue by conducting a joint survey and entering into a stipulation. The stipulation stated that the six features identified by Alaska do not exist, but that twelve other features discovered by the survey do qualify as low-tide elevations. The Special Master concluded that the stipulation resolved the issue. Report 338-340.

2. Federal Reservations

For some parts of Alaska's Arctic coast, the federal and state rights in submerged lands cannot be determined by simply applying the Submerged Lands Act's basic formula of locating the coastline and identifying the three-mile grant. Report 343. In particular, Section 5(a) of the Submerged Lands Act excludes from the grant under that formula submerged lands "expressly retained by * * * the United States when the State entered the Union." 43 U.S.C. 1313(a). Section 5(a) comes into play in evaluating the scope and effect of two federal reservations that are currently known as: (a) the National Petroleum Reserve; and (b) the Arctic National Wildlife Refuge. See Report 2 (Fig. 1.1).

a. *The National Petroleum Reserve* (Report 343-446). The National Petroleum Reserve is a 23 million acre area that extends from Icy Cape to the mouth of the Colville River. See Report 343-348. President Harding created that reservation in 1923 through Executive Order No. 3797-A, which designated the pertinent lands as Naval Petroleum Reserve No. 4.

Report 343-344. The Executive Order explicitly recognized that "there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast." *Id.* at 343 n.1. The Executive Order set apart the designated area specifically to preserve a "future supply of oil for the Navy." *Ibid.* Congress later transferred the area to the Secretary of the Interior and renamed it the National Petroleum Reserve in Alaska. See Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, § 102, 90 Stat. 303.

In the initial proceedings before the Special Master, the State of Alaska explicitly conceded that the United States "expressly retained" the submerged lands associated with the National Petroleum Reserve, and it raised only issues respecting the scope of the reservation. Report 344-346. But in 1981, after this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), Alaska sought relief from its concession and raised an additional claim that it owned the submerged lands underlying tidal lagoons within the exterior boundaries of the National Petroleum Reserve. Alaska also relied on this Court's later decision in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987). Report 346-348.

The Master's Report accordingly addresses four issues respecting the National Petroleum Reserve:

Whether Harrison Bay and Smith Bay are part of the National Petroleum Reserve. Report 349-352 (Question 7).

Whether Peard Bay is part of the National Petroleum Reserve. Report 352-364 (Question 8).

Whether Wainwright Inlet and the Kuk River, Kugrua Bay and River, and other small inlets, bays and river estuaries are within the boundary of the National Petroleum Reserve. Report 364-381 (Question 11).

Whether this Court's decisions in *Montana* and *Utah* affect the scope of the National Petroleum Reserve's reservation of submerged lands. Report 381-446.

i. *Harrison Bay and Smith Bay* (Report 349-352). Harrison Bay and Smith Bay are coastal features located east of Point Barrow. See Report 2 (Fig. 1.1). In 1972, the Department of the Navy issued a notice purporting to place those features within the seaward boundary of the Reserve. See 37 Fed. Reg. 10,088. The United States and Alaska agreed, however, that the reservation boundary set out in the 1923 Executive Order creating the Reserve does not encompass the area between the headlands creating Harrison Bay and Smith Bay, but instead follows the high-water line along the physical coastline. The United States and Alaska also agreed that the Navy's 1972 notice could not expand the boundary of the Reserve. The Master accordingly recommended, in accordance with the joint submission of the parties, that the National Petroleum Reserve does not include the seaward limits of Harrison Bay and Smith Bay. Report 349-352.

ii. *Peard Bay* (Report 352-364). Peard Bay is a coastal feature located west of Point Barrow. See Report 2 (Fig. 1.1). The United States and Alaska agreed that the question whether Peard Bay is within the boundary of the Reserve turns on the description

contained in the 1923 Executive Order, which provides in relevant part:

The coast line to be followed shall be that of the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore.

See Report 344 n.1; *id.* at 352. Under that definition, Peard Bay is inside the National Petroleum Reserve if it qualifies as a small lagoon with appropriate barrier reefs. The United States and Alaska disputed whether it so qualifies. *Ibid.*

The Special Master concluded that "the Reserve boundary at Peard Bay should be determined using only the language of the Executive Order and the most recent charts." Report 357. Applying that test, he found that (1) "the islands in the mouth of Peard Bay meet the test of being 'not over three miles off shore,'" *id.* at 360; (2) and "Peard Bay, being seventy to eighty percent enclosed, is adequately cut off from the sea to be a lagoon," *id.* at 363. The Master accordingly recommended that Peard Bay is within the exterior boundary of the Reserve. *Id.* at 364.

iii. *Wainwright Inlet and Kuk River, Kugrua Bay and River, and other small inlets, bays and river estuaries* (Report 364-381). The National Petroleum Reserve includes a number of small inlets on, and rivers that drain into, the Arctic Ocean. The United States and Alaska disagreed over whether the National Petroleum Reserve's northern boundary includes submerged lands associated with those features. Alaska argued that the boundary of the Reserve follows the sinuosities of the shore, extending into bays, inlets, and river estuaries. The United

States argued, by contrast, that the boundary follows the coastline of the Arctic Ocean and includes short water crossings across inlets, river mouths, and narrow mouthed bays. Report 364-366; *id.* at 348 (Figs. 8.1-8.3).

The Master determined that the Reserve boundary should be determined on the basis of the 1923 Executive Order, taking into account "what the drafters would have meant to include in the Reserve given their language, their purposes, and the particular geography." Report 367, 372. He concluded that Wainwright Inlet, as well as other small indentations, qualifies as "a small lagoon with barrier reefs." *Id.* at 373, 375. He also concluded, based on the "ordinary meaning of 'coast' as excluding river banks, the difficulties in defining and locating the place where a tidal datum intersects a river, and the views expressed by the Court in [*Knight v. United States Land Ass'n*, 142 U.S. 161 (1891)]," that the Reserve boundary does not extend up rivers. *Id.* at 380.

The Master noted that his interpretation is consistent with the likely intention of the drafters. He observed, "[f]or the policy purpose of conserving underground petroleum resources, the relatively smooth boundary defined by small water crossings is also more appropriate than one that would follow the sinuosities of the shore into small inlets and go part way up rivers." Report 380. The Master accordingly recommended that the Reserve boundary includes the areas in dispute. *Id.* at 380-381.

iv. *The Equal Footing Doctrine and issues stemming from Montana and Utah* (Report 381-446). As the Special Master noted, the fact that submerged lands lie inside the boundary of the National Petroleum Reserve does not necessarily establish that the

United States retains title to those lands. Report 381-382. Under the Equal Footing Doctrine, the United States holds title to tidelands and lands beneath inland navigable waters within a pre-statehood territory in trust for the future State, and there is a "strong presumption" that those lands pass to the State upon admission to the Union. See *Utah Division of State Lands*, 482 U.S. at 196; *Montana*, 450 U.S. at 551; Report 382. But as the Special Master also noted, there are two important qualifications to that general rule that are relevant here.

First, the Equal Footing Doctrine applies only to land beneath tidelands and inland navigable waters; it does not reach land beneath the territorial sea. *United States v. California*, 332 U.S. 19 (1947). As the Court explained, there is no conceptual or historical justification for extending the Equal Footing Doctrine to the territorial sea, because the original thirteen colonies had no claim to such lands. *Id.* at 31-33. As the Court additionally noted, the Doctrine rests on the theory that the States have paramount sovereign interests "in inland waters to the shoreward of the low water mark," and "the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt." *Id.* at 36. Hence, the State's right to submerged land beneath the territorial sea is governed strictly by the Submerged Lands Act. Report 390-394.

Second, even where the Equal Footing Doctrine does apply, "Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of

such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the Territory." *Shively v. Bowlby*, 152 U.S. at 48; see U.S. Const. Art. IV, § 3, Cl. 2 (Property Clause). By the same token, Congress may reserve such lands in federal ownership, rather than convey them, to carry out appropriate public purposes. See Report 395-404.

The Master concluded that the United States had reserved the submerged lands within the boundary of the National Petroleum Reserve and thereby prevented title from passing to the State of Alaska at statehood. Report 404-446. The Master first determined that Congress, through the Pickett Act, ch. 421, § 1, 36 Stat. 847, had authorized the President to reserve those lands. Report 404-416. The Master next determined that the 1923 Executive Order identified an appropriate public purpose for a reservation—namely, to preserve petroleum resources for national defense—and expressed a clear intent to reserve all lands under tidally influenced waters inside the boundary of the Reserve. *Id.* at 416-430. He also determined, based on specific provisions of the Alaska Statehood Act, that the reservation was intended to defeat the State's title. *Id.* at 430-445.

The Master summarized his findings respecting the submerged lands within the boundary of the National Petroleum Reserve as follows:

To the extent that these lands underlie inland waters, I found * * * that the circumstances of the Reserve were sufficient to overcome the strong presumption, as spelled out in *Montana* and *Utah*, that title passed to Alaska at statehood.

To the extent that the lands underlie territorial waters, I found that the presumption of *Montana* and *Utah* does not apply. As to these lands, the result therefore follows a fortiori.

Report 445. He accordingly concluded that Peard Bay, Wainwright Inlet, and other submerged lands within the Reserve's boundaries belong to the United States. *Id.* at 445-446.

b. *The Arctic National Wildlife Refuge* (Report 447-499). The Arctic National Wildlife Refuge is a federal reservation of approximately 18.1 million acres in northeastern Alaska that has been set aside for protection of the unique wildlife habitat in that region. See Report 2 (Fig. 1.1). The Department of the Interior's Bureau of Sport Fisheries and Wildlife submitted an application to the Secretary of the Interior for withdrawal of 8.9 million acres of land in that area on November 18, 1957. See 23 Fed. Reg. 364 (1958). See Report 447-450 & n.4. The Secretary of the Interior formally withdrew those lands and established the Arctic National Wildlife Range on December 6, 1960. Public Land Order 2214, 25 Fed. Reg. 12,598 (1960). Congress later expanded the Range to include an additional 9.2 million acres and renamed it the Arctic National Wildlife Refuge. See Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 303(2)(A), 94 Stat. 2390 (1980). See Report 450-451.

The Master's Report addresses two points of contention between the United States and Alaska with respect to the Arctic National Wildlife Refuge:

Whether the application for withdrawal and creation of the Arctic Wildlife Range, which was filed before but confirmed after Alaska's admission to

the Union, effectively withheld from Alaska any offshore submerged lands included within the application. Report 455-477 (Question 9).

If so, whether the Range embraced the submerged lands between the mainland and the barrier islands in the area between the Canadian border and Brownlow Point. Report 477-499 (Question 10).

i. *The effectiveness of the withdrawal application (Report 455-477).* The United States' assertion that it retained submerged lands in the Arctic Wildlife Range rested in substantial part on the legal consequences of a withdrawal application under the Department of the Interior's regulations in effect in 1957. The Department regulations in force at that time provided that the filing of an application

shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

See Report 452 n.8 (quoting 22 Fed. Reg. 6613, 6614 (1957)); 43 C.F.R. 295.11(a) (1958 Supp.). The United States argued that the filing of the application segregating those lands prevented them from passing to Alaska.

The United States took the position that this result followed as a matter of congressional retention. The Alaska Statehood Act explicitly withheld from Alaska various lands, including "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." Pub. L. No. 85-

508, § 6(e), 72 Stat. 340-341 (1958) (emphasis added). The United States argued that, because the application had the legal effect of segregating the designated lands for creation of the Arctic Wildlife Range, it "set apart" those lands as a refuge for wildlife within the meaning of Section 6(e) of the Statehood Act. The United States also argued that, even apart from the provisions of the Alaska Statehood Act itself that withheld from the State lands set apart as a wildlife refuge, the segregative effect of the application under the facts presented here was sufficient to establish an "express retention" of those lands under Section 5(a) of the Submerged Lands Act, 43 U.S.C. 1313(a), thereby withholding them from that Act's grant of submerged lands to the State.

The Special Master rejected those arguments. Report 455-477. He reiterated the general principles governing reservations of submerged lands, set out the relevant statutes, and made several general observations concerning those arguments. *Id.* at 455-462. He then turned to the United States' argument under Section 6(e) of the Alaska Statehood Act. *Id.* at 462-467. The Master reasoned that, "[a]lthough the application and the regulation together caused land to be set apart for the purpose of a wildlife reservation, it was not yet set apart as a refuge or reservation." *Id.* at 464. He concluded that Section 6(e) was therefore insufficient to defeat Alaska's title to submerged lands within the Range. *Id.* at 467.

The Master also concluded that the application had not resulted in an express executive retention of submerged lands under Section 5(a) of the Submerged Lands Act. Report 467-477. He concluded that the mere filing of an application, by itself, was insuffi-

cient to result in an express retention. *Id.* at 467-472. While not reaching the issue, the Master expressed "doubt" whether the Secretary of the Interior would have had authority to retain those submerged lands under the precise circumstances presented here. *Id.* at 473-477.

ii. *The interpretation of the withdrawal application (Report 477-499).* The Master recognized that his determination that the withdrawal application for the Arctic Wildlife Range was ineffective to reserve submerged lands therein, if accepted by the Court, would moot the question of what submerged lands, if any, the application covered. He nevertheless addressed that issue in the event that the Court does not accept his recommendation. Report 477-478. After examining the application's boundary description and other indicia of intent, the Master determined that "the disputed lands—including lagoons, tidelands, and the tidal parts of rivers—are inside the boundary of the Range." *Id.* at 499; see *id.* at 478-495. He also determined that the United States had established an intent to retain those lands for a proper public purpose and to defeat the State's title, see *id.* at 495-499, finding it "clear that the reservation was meant to have permanent effect," *id.* at 496. The Master accordingly concluded that, "if the acreage included in the application was effectively withheld from Alaska, the Range does embrace the disputed lands." *Id.* at 499.

3. Summary of Recommendations

The Special Master recapitulated his conclusions in a brief summary. See Report 503-505. His recom-

mendations (placed in the original order of the questions presented, see *id.* at 509-511) are as follows:

Question 1. The Court should grant Alaska's motion for leave to file a counterclaim. Report 5-7.

Question 2. The extent of Alaska's submerged lands in the leased area should not be determined on the basis of straight baselines. Report 19-175.

Question 3. The submerged lands between the mainland and the barrier islands in the leased area do not underlie inland waters and accordingly do not belong to Alaska. Report 19-175.

Question 4. The submerged lands between the mainland and the barrier islands in the leased area that are more than three miles from any upland, but are totally surrounded submerged lands owned by Alaska, do not belong to Alaska on the theory that they lie within Alaska's most seaward contiguous boundary. Report 19-175.

Question 5. The formation known as Dinkum Sands is not an island constituting part of Alaska's coastline for purposes of delimiting Alaska's offshore lands. Report 227-310.

Question 6. The 1976 extension of the ARCO pier is a part of the mainland for purposes of the Submerged Lands Act. Report 311-337.

Question 7. Harrison Bay and Smith Bay are not part of the National Petroleum Reserve. Report 349-352.

Question 8. Peard Bay is part of the National Petroleum Reserve. Report 352-364.

Question 9. The application for withdrawal and creation of the Arctic Wildlife Range did not effectively withhold offshore submerged lands from Alaska. Report 455-477.

Question 10. Assuming that the acreage included in the application for withdrawal and creation of the Arctic Wildlife Range was effectively withheld from Alaska, the Range embraced the submerged lands between the mainland and the barrier islands in the area between the Canadian boundary and Brownlow Point. Report 477-499.

Question 11. The submerged lands within Wainwright Inlet and the Kuk River, Kugrua Bay and River are within the boundary of the National Petroleum Reserve. Other small inlets, bays, and river estuaries, between Icy Cape and Point Barrow and between Point Tangent and the Colville River, are within the boundary of the National Petroleum Reserve to the extent that they constitute either small lagoons with barrier reefs less than three miles offshore or rivers. In addition, the lands under tidally influenced waters within the boundary of the Reserve are part of the Reserve. Report 364-445.

Question 12. The extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the Leased Area, should not be determined on the basis of straight baselines. Report 19-175.

Question 13. The extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the Leased Area, should not be determined on the basis that the waters between mainland and the barrier islands are inland waters. Report 19-175.

Question 14. The specified geographic features within Beaufort Sea are not low-tide elevations, but twelve other features whose existence as low-tide elevations has been stipulated may be used in measuring Alaska's submerged lands. Report 338-340.

Question 15. The southern portion of Harrison Bay, as shown on NOS chart 16064, is a juridical bay as contended by Alaska and its closing line should be that agreed on by the parties. Report 176-226.

The Master's recommendations on Questions 1, 7, and 14 reflect what were, or ultimately became, uncontested issues. The Master's recommendations on Questions 2, 3, 4, 5, 8, 10, 11, 12, and 13 are in accord with the United States' position at trial. The Master's recommendations on Questions 6, 9, and 15 are in accord with Alaska's position at trial.

C. The Exception of the United States

The Special Master's Report provides a comprehensive and well reasoned analysis of the issues presented by this case. The Master exhaustively examined and cogently evaluated the factual and legal bases of the parties' arguments. The United States submits that the Master's recommendations provide a fair and satisfactory resolution of all the issues

except one. We disagree with his conclusion that the application for withdrawal and creation of the Arctic Wildlife Range did not effectively withhold offshore submerged lands from Alaska. That recommendation, which would divest the United States of a portion of the Arctic National Wildlife Refuge, could greatly impair the federal government's ability to manage the wildlife resources therein.

Our exception is a narrow one. We agree with the Master's articulation of the general principles that govern whether the United States has reserved offshore submerged lands from passage into state ownership. See Report 455-457. And although we do not agree with the Master's conclusion on the point, we have elected not to include in our exception a challenge to his subsidiary determination that, under the specific facts presented here, the Department of the Interior's actions by themselves—including the submission of an application for withdrawal of what would become the National Wildlife Range and the temporary segregation of those lands under the Department's regulations—were insufficient standing alone to establish an express retention of submerged lands by executive action, pursuant to Section 5(a) of the Submerged Lands Act. *Id.* at 467-472.

We do except, however, to the Special Master's conclusion that Congress did not retain the submerged lands within the Arctic Wildlife Range in federal ownership. Report 462-467. We submit that Congress preserved federal title to those lands through Section 6(e) of the Alaska Statehood Act, which expressly retained in federal ownership all lands within the proposed boundaries of the Arctic Wildlife Range.

SUMMARY OF ARGUMENT

The Special Master has thoroughly addressed the contentions of the United States and the State of Alaska concerning their respective rights to submerged lands along Alaska's Arctic coast. We submit that the Master has proposed a proper resolution of every issue except one. We disagree with his recommendation respecting Question 9, in which he proposes that Congress did not retain offshore submerged lands within the proposed boundaries of the Arctic Wildlife Range.

A. This Court has ruled that the United States has paramount constitutional power over lands beneath the territorial sea, which extends seaward from the low-water line. *United States v. California*, 332 U.S. 19 (1947). Those lands are not subject to the Equal Footing Doctrine, which applies only to tidelands and inland navigable waters. See *id.* at 31-39. The territorial sea "is a national, not a state concern. National interests, national responsibilities, national concerns are involved." *United States v. Louisiana*, 339 U.S. 699, 704 (1950). There is accordingly a strong presumption that the United States retains that property on behalf of the Nation's citizenry. See *Montana v. United States*, 450 U.S. 544, 551-552 (1981).

B. Congress, in the exercise of its paramount powers, has enacted the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which grants the States a specified measure of submerged land seaward of the coastline. See 43 U.S.C. 1311-1314. The Submerged Lands Act also contains, however, significant exceptions, including Section 5(a), which withholds from a State "all lands expressly retained by * * * the

United States when the State entered the Union.” 43 U.S.C. 1313(a). Because the Submerged Lands Act is an “exercise of Congress’ power to dispose of federal property,” it must be interpreted in light of “the principle that federal grants are to be construed strictly in favor of the United States.” *California ex rel. State Lands Comm’n v. United States*, 457 U.S. 273, 285, 287 (1982).

C. Congress “expressly retained” submerged lands within the Arctic Wildlife Range through the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). Section 6(e) of the Statehood Act relinquished to Alaska the United States’ title to federal property that is used solely for wildlife conservation, but it expressly excepted and retained in federal ownership “lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.” 72 Stat. 340-341. At the time of statehood, the Arctic Wildlife Range, including the submerged lands within its boundaries, had been “set apart” as a future wildlife refuge. Accordingly, Section 6(e) expressly retained the submerged lands beneath the territorial sea in federal ownership. Even if there were doubts respecting whether Congress retained the lands, those doubts must be resolved in favor of the United States. See, e.g., *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983).

D. Congress also retained tidelands within the boundaries of the Arctic Wildlife Range. The Master concluded that, if Section 6(e) retained the Arctic Wildlife Range in federal ownership, then under this Court’s decisions in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), and *Montana v. United States*, *supra*, it also retained the periodically submerged lands between low and high tide. Hence,

if this Court concludes that the United States is entitled to the lands beneath the territorial sea, it is entitled to the tidelands as well.

ARGUMENT

CONGRESS RETAINED FEDERAL OWNERSHIP OF ALL OFFSHORE SUBMERGED LANDS WITHIN THE BOUNDARIES OF THE ARCTIC WILDLIFE RANGE

The Special Master correctly articulated the general legal principles that govern whether the United States retains ownership of offshore submerged lands. See Report 15-18, 381-404, 455-457. The Master erred, however, in applying those principles to the particular question of whether Congress retained offshore submerged lands within the Arctic Wildlife Range. See *id.* at 462-467. We summarize the general principles in Parts A and B below. We then explain in Parts C and D the basis for our disagreement with the Master’s determination that Congress failed to retain federal ownership of offshore submerged lands in the Range.

A. The United States Has Paramount Constitutional Power Over Lands Beneath The Territorial Sea

This Court’s landmark decision in *United States v. California*, 332 U.S. 19 (1947), addressed the question whether the United States or the various individual coastal States have “paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited.” *Id.* at 29. The Court categorically ruled that the Nation, rather than the individual States, “has paramount rights in and power over that belt, an incident to which is full

dominion over the resources of the soil under that water area, including oil." *Id.* at 38-39. Accord *United States v. Maine*, 420 U.S. 515, 519-525 (1975); *United States v. Texas*, 339 U.S. 707, 719 (1950); *United States v. Louisiana*, 339 U.S. 699, 704 (1950).

The Court specifically rejected California's argument that the individual States acquired ownership of lands beneath the territorial sea under the Equal Footing Doctrine set out in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). See *California*, 332 U.S. at 29-39. The Court did not question *Pollard's* basic tenets that a new State is admitted on an equal footing with the original thirteen colonies, that the United States holds title to tidelands and lands beneath inland navigable waters within pre-statehood territories in trust for the future States, and that a new State generally succeeds to the United States' ownership of such lands (44 U.S. (3 How.) at 228-229). See 332 U.S. at 31-32. The Court concluded, however, that the so-called Equal Footing Doctrine does not extend beyond a State's coastline. *Id.* at 31-39. See also pages 5-7, *supra*.

The Court explained that the original thirteen colonies had no right to lands below the low-water line. *California*, 332 U.S. at 30-33. To the contrary, through the exercise of its national powers, the United States acquired sovereign rights in the coastal lands seaward of the low-water line. *Id.* at 33-36. Newly created States have no conceptual or historical justification for claiming those lands on an "equal footing" rationale. The Court accordingly refused "to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern." *Id.* at 36.

The Court additionally recognized that *Pollard's* rationale of sovereign entitlement actually supports the United States' claim of title. As the Court explained:

If this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt.

California, 332 U.S. at 36. Accord *Maine*, 420 U.S. at 520-522; *Louisiana*, 339 U.S. at 704; *Texas*, 339 U.S. at 719. See *Louisiana*, 339 U.S. at 704 ("The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved.").

The Court's ruling that the United States and the individual States have symmetrical sovereign interests on the opposing sides of the low-water mark confirms an important rule of construction governing grants of submerged lands. The United States may convey lands beneath navigable waters, but there is a "strong presumption against conveyance by the United States." *Montana v. United States*, 450 U.S. 544, 551-552 (1981). As the Court has explained:

[B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against

conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

Id. at 552 (internal citations omitted); accord *Utah Division of State Lands v. United States*, 482 U.S. 193, 197-198 (1987). That rule of construction applies both to tidelands, which are held by the United States in trust for future States, and to lands beneath the territorial sea, which are held by the United States for its own use. The terms and logic of the rule draw no distinction between submerged lands that are above and those that are below the low-water line. In either instance, there is a strong presumption that the United States retains the property so that the sovereign that possesses paramount rights may determine the appropriate public use. See generally Report 390-394, 456.

B. Congress Has Exercised The United States' Paramount Power Through The Submerged Lands Act

Congress has exercised the United States' paramount power over the territorial sea by, among other things, enacting the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* See *Maine*, 420 U.S. at 524-525. As this Court has explained, the Submerged Lands Act "embraced" the premise that "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty." *Id.* at 524. The Act "concededly did not impair the validity of the *California*, *Louisiana*, and *Texas* cases, which are admittedly applicable to all coastal States." *Id.* at 526

(quoting *United States v. Louisiana*, 363 U.S. 1, 7 (1960)).

The Submerged Lands Act grants the coastal States title to a specified measure of submerged land seaward of the coastline, subject to certain important exceptions. See 43 U.S.C. 1311-1314. Section 3(a) of the Act provides in pertinent part that

title to and ownership of the lands beneath navigable waters within the boundaries of the respective States * * * be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States.

43 U.S.C. 1311(a). As a general matter, Section 3(a) confirms an individual State's title to tidelands and additionally grants the States title to submerged lands beneath a three-mile belt of the territorial sea. See § 2(a), 43 U.S.C. 1301(a) (defining "lands beneath navigable waters"). The Act also confirms the United States' rights to all submerged lands "lying seaward and outside of the area of lands beneath navigable waters, as defined in [Section 2]." § 9, 43 U.S.C. 1302. See Report 16 n.1.

The Submerged Lands Act's grant of submerged lands to the States is subject to important exceptions. Of particular interest here, Section 5(a) of the Act states in pertinent part:

There is excepted from the operation of [Section 3(a)] —

(a) * * * all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea).

43 U.S.C. 1313(a). That provision prevents the Submerged Lands Act from divesting the United States of specific lands that the United States has expressly reserved for federal use at the time of statehood. See S. Rep. No. 133, 83d Cong., 1st Sess. 16, 20 (1953) (describing the language as "self-explanatory"); 99 Cong. Rec. 2619 (1953) ("The purpose of the language is to reserve to the United States those facilities and those areas which are used by the Government in its governmental capacity for one or more of its governmental purposes.") (Sen. Cordon).

This Court has held that the Submerged Lands Act is "a constitutional exercise of Congress' power to dispose of federal property." *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 285 (1982); *United States v. Louisiana*, 446 U.S. 253, 256 (1980). See *Alabama v. Texas*, 347 U.S. 272 (1954) (per curiam). The Court has accordingly stated that its provisions and limitations must be interpreted in light of "the principle that federal grants are to be construed strictly in favor of the United States." *California ex rel. State Lands Comm'n*, 457 U.S. at 287 (citing *United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960), and *United States v. Union Pac. R.R.*, 353 U.S. 112, 116 (1957)). Under that principle, if there are doubts concerning what the Act grants to the States, "they are resolved for the Government, not against it." *Union Pac. R.R.*, 353 U.S. at 116. See pages 46-51, *infra*.

C. Congress Retained Submerged Lands Beneath The Territorial Sea Within The Boundaries Of The Arctic Wildlife Range

The question whether the United States has retained its interest in submerged lands beneath the territorial sea turns on the application of the forego-

ing general principles to the circumstances of this case. We submit that Congress expressly retained submerged lands within the Arctic Wildlife Range through the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958).

1. The Alaska Statehood Act sets out the principles for the retention of the United States' title to real property

The Alaska Statehood Act explicitly addresses the retention and division of the United States' title in the former Territory of Alaska. Section 5 sets out the principle that generally controls:

Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

72 Stat. 340. Section 6 contains a series of subsections that address property issues of special interest. Two provisions are particularly pertinent to the Arctic Wildlife Range.

First, Section 6(e) addresses the question whether the United States should retain title to property that is used for conservation and protection of Alaskan fisheries and wildlife. See 72 Stat. 340-341. Section 6(e) answers that question as follows:

All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of [specific federal statutes], shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: * * * *Provided, That such transfer shall not include lands withdrawn or*

otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife.

72 Stat. 340-341 (emphasis added); see Report 462-463. Hence, Section 6(e) relinquished to Alaska the United States' title to federal property that is used solely for wildlife conservation, but expressly excepted and retained in federal ownership "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Ibid.*

Second, Section 6(m) addresses the question of Alaska's entitlement to submerged lands. Under this Court's decision in *California, supra*, the United States held pre-statehood title to submerged lands beneath the territorial sea surrounding the Territory of Alaska. Section 6(m) conveyed a substantial portion of those lands to Alaska by providing as follows:

The Submerged Lands Act of 1953 shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

72 Stat. 343 (citation omitted). Hence, Alaska is entitled to submerged lands beneath the territorial sea in accordance with the provisions, and subject to the exceptions, contained in the Submerged Lands Act. As noted above, Section 5(a) of the Submerged Lands Act excepts from conveyance "all lands expressly retained by * * * the United States when the State entered the Union." 43 U.S.C. 1313(a).

2. Section 6(e) of the Alaska Statehood Act "expressly retained" submerged lands beneath the territorial sea within the boundaries of the Arctic Wildlife Range

As the Special Master recognized, the question whether the United States retained title to the submerged lands beneath the Arctic Wildlife Range turns on the construction of Section 6(e) of the Alaska Statehood Act. Report 462-467. We submit that Section 6(e) "expressly retained" the United States' title to all lands within the boundaries of the Arctic Wildlife Range, and it therefore prevented the passage of the submerged lands therein to the State of Alaska under Section 5(a) of the Submerged Lands Act, 43 U.S.C. 1313(a).

Our argument rests on three basic propositions: (a) The application to create the Arctic Wildlife Range encompassed offshore submerged lands; (b) that application had the legal effect of designating "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife" for purposes of Section 6(e) of the Alaska Statehood Act; and (c) if there is any doubt as to whether Section 6(e) "expressly retained" those lands, the doubt must be resolved in favor of the United States. The Master agreed with the United States on the first issue, partially agreed on the second, and overlooked the third.

a. *The Range boundary included submerged lands.* As the Master explained, the Interior Department's Bureau of Sport Fisheries and Wildlife filed an application with the Secretary of the Interior for withdrawal of public lands to create the Arctic Wildlife Range. See Report 447 & n.1. The Department published notice of the application, which included a

description of the proposed boundary. *Id.* at 448 & n.2. See 23 Fed. Reg. 364 (1958). That boundary enclosed the lands in the coastal area as follows:

Beginning at the Intersection of the International Boundary line between Alaska and Yukon Territory, Canada, *with the line of extreme low water of the Arctic Ocean* in the vicinity of Monument 1 of said International Boundary line;

Thence westerly *along the said line of extreme low water, including all offshore bars, reefs, and islands* to a point of land on the Arctic Seacoast known as Brownlow Point.

Ibid. (emphasis added); see also Report 478-479. The Master carefully examined the precise formulation of the boundary description, as well as other evidence of the intent. *Id.* at 479-495. He correctly concluded that the proposed boundary establishes "a single continuous line, following the seaward side of offshore bars, reefs, and islands and, where it meets rivers, crossing such rivers at their mouths." *Id.* at 495; see *id.* at 479-495. The application for creation of the Arctic Wildlife Range accordingly embraces portions of the territorial sea, including lagoons between the mainland and barrier islands. See *id.* at 450 (Figs. 9.1 & 9.2).

b. *The application served to "set apart" the designated lands as a wildlife refuge.* As the Master recognized, the application for creation of the Arctic Wildlife Range preserved the United States' title to the submerged lands designated therein if the application fell within the scope of Section 6(e) of the Alaska Statehood Act, which expressly retained in federal ownership "lands withdrawn or otherwise set apart as

refuges or reservations for the protection of wildlife." 72 Stat. 341. See Report 464.

The application fell within the reach of that language because it was the legal mechanism by which the Interior Department at that time "set apart" public lands for the creation of a wildlife refuge. Under the Department's regulations, the purpose and legal effect of the application was to

temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

43 C.F.R. 295.11(a) (1958 Supp.); see 22 Fed. Reg. 6614 (1957); Report 452 n.8. Hence, the application, as a matter of law, set apart the described lands for administration in accordance with the limitations that apply to wildlife refuges. 43 C.F.R. 295.11(a) (1958 Supp.); see Report 447 n.1 (segregation allowed mineral leasing in accordance with regulations that apply to "Federal wildlife lands"); *id.* at 448 n.2 (accord); see also Public Land Order 1621, 23 Fed. Reg. 2637 (1958) (excepting the area included in the application from mineral location and leasing).

The Master acknowledged that "the words 'otherwise set apart' do describe the effect of an application under the regulation." Report 464. He concluded, however, as follows:

Although the application and the regulation together caused land to be set apart for the purpose of a wildlife reservation, it was not yet set apart as a refuge or reservation. It may be that the tempo-

rary segregation had essentially the same effect as a withdrawal of lands, in that both prevented disposition under the public land laws. But the segregation did not have the same effect as a reservation of lands, dedicating them to a specific public purpose.

Ibid. We disagree with that analysis. The Master's formalistic distinction between setting apart land "as" a refuge, as opposed to "for the purpose of" a refuge, is inconsistent with the established use of the terminology at issue.

Under the Master's interpretation, Section 6(e) would apply only to withdrawals that create a permanent "reservation of lands, dedicating them to a specific public purpose." Report 464. But as the Master notes elsewhere in his Report, there is a distinction between withdrawing and reserving lands. The Master quotes approvingly from the Public Land Law Review Commission's authoritative work, *One Third of the Nation's Land*, which states:

To "withdraw" public lands means to withhold them from settlement, sale, or entry under some or all of the general land laws for the purpose of maintaining the status quo because of some exigency or emergency, to prevent fraud, to correct surveys or boundaries, to dedicate the lands to an immediate or prospective public use, or to hold the land for certain future action by the executive or legislative branch of government.

Report 395 n.40 (quoting U.S. Public Land Law Review Comm'n, *One Third of the Nation's Land: A Report to the President and to the Congress* 42 n.1 (1970)). The Commission specifically noted that the term "withdrawal" is not synonymous with the term

"reservation," which "is the immediate dedication of lands to a predetermined purpose and includes, in effect, a withdrawal." *Ibid.*

If Congress had intended Section 6(e) to apply only to lands that had been conclusively "dedicat[ed] * * * to a specific public purpose" (Report 464), it would have used the word "reservation." Congress did not do so, nor did it stop at the use of the broader term "withdrawal," which could be sufficient in itself to describe the temporary segregation at issue here. See 104 Cong. Rec. 12,257-12,258 (1958) (Rep. Saylor) (noting that the Interior Department "withdrew temporarily some 9 million acres of lands along the Canada-Alaska border as the proposed Arctic Wildlife Range"). Instead, Congress used still broader terminology, retaining title to "lands withdrawn or otherwise set apart as refuges." 72 Stat. 341.

Under ordinary canons of statutory construction, Congress's formulation cannot be limited to lands that have been formally "withdrawn" as refuges. See, e.g., *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995) ("the Court will avoid a reading which renders some words altogether redundant"); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2413 (1995) (accord). The additional operative phrase "otherwise set apart" aptly describes lands, like those designated for the Arctic Wildlife Range, that have been administratively segregated for future use "as refuges" pending final executive or legislative action.

Long before Congress enacted Section 6(e), this Court had recognized "the right of the Executive to make temporary withdrawals of public land in the public interest." *United States v. Midwest Oil Co.*, 236 U.S. 459, 479 (1915). The Court specifically re-

jected the notion that the Executive could make only permanent reservations, stating:

It is only necessary to point out that, as the greater includes the lesser, the power to make permanent reservations includes the power to make temporary withdrawals. For there is no distinction in principle between the two. The character of the power exerted is the same in both cases. In both, the order is made to serve the public interest and in both the effect on the intending settler or miner is the same.

Id. at 476. Congress, which is presumed to be aware of this Court's decisions, *e.g.*, *North Star Steel Co. v. Thomas*, 115 S. Ct. 1927, 1930 (1995), enacted the precise terminology of Section 6(e) to ensure that it would reach both lands that had been formally withdrawn as wildlife reservations and lands, like the proposed Arctic Wildlife Range, that had been temporarily "set apart" for such future use. That interpretation gives meaning to all of the words Congress used, and at the same time yields a sensible construction. It recognizes the government's long-standing and familiar practice, codified in Department regulations, of setting apart land for a conditional future use. See, *e.g.*, *Midwest Oil Co.*, 236 U.S. at 469-472, 475-481; *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 381 (1868).

The Master suggested an additional reason why Section 6(e) should not apply to the Arctic Wildlife Range. He noted that the Interior Department had proposed the language of Section 6(e) in 1950, before the Interior Department had promulgated the particular regulation that provided for administrative segregation of the lands in question. See Report 464-

466 & n.17. The Master concluded on that basis that the "the words 'otherwise set apart' cannot have been intended originally to take in lands applied for but not yet withdrawn." *Id.* at 466. The Master's conclusion is mistaken and, moreover, beside the point.

As *Midwest Oil* indicates, for many years the Executive Branch had followed the practice of temporarily segregating public lands for proposed future uses. See 236 U.S. at 475-481. And even before the Interior Department's 1952 promulgation of 43 C.F.R. 295.11(a), the Department had followed the practice of segregating lands upon a request for withdrawal. For example, the March 16, 1948, version of the Bureau of Land Management (BLM) Manual provided that, upon receipt of a request for withdrawal, the BLM would "suspend all applications to enter or lease the lands, the allowance of which is discretionary." BLM Manual § 57.130(b) (Mar. 16, 1948). In any event, that Master's concern respecting the historical relationship between Section 6(e) and the Interior regulation is largely inapposite. This Court construes the words of a statute, and not the subjective intent of those who first proposed them. The pertinent fact is that the plain text of Section 6(e) would have been reasonably understood at the time of statehood to reach lands segregated under the Interior Department's regulation, which had been in effect for more than five years.

The Special Master also expressed concern that the United States' interpretation of Section 6(e) would leave uncertain who held title in the event that the Secretary ultimately denied the application. Report 467 (referencing his discussion at pages 459-462). His concerns on that score, however, are misplaced. Under the United States' construction of Section

6(e), the administrative segregation of the Arctic Wildlife Range was sufficient to retain the United States' title to all lands within the proposed boundaries, including the submerged lands beneath the territorial sea. If the Secretary had ultimately denied the application, the United States would have continued to own those submerged lands—just as it had during the territorial period—unless and until Congress elected to convey them to Alaska.

There is nothing anomalous in the possibility that the United States might have retained submerged lands underlying the territorial sea that were originally intended for a wildlife refuge, pending a decision how the lands might best be put to an alternative use. After all, the United States has always had "paramount rights" over those lands. *Maine*, 420 U.S. at 524. In all likelihood, Alaska could have persuaded Congress to convey those lands to the State if the proposed Arctic Wildlife Range had not come into fruition. Congress, which is composed of Representatives of the individual States, routinely provides for the conveyance of particular lands to individual States when such conveyances are in the public interest. See, e.g., Federal Land Policy and Management Act of 1976, § 211, 43 U.S.C. 1721.

c. *Any doubts must be resolved in favor of the United States.* We submit that Section 6(e) of the Alaska Statehood Act is unambiguous. By its terms, it retained the United States' title to lands within the Arctic Wildlife Range, including submerged land beneath the territorial sea. Accordingly, Section 6(m) of the Alaska Statehood Act, which declares that the Submerged Lands Act applies to Alaska, does not grant those submerged lands to the State. They remain in federal ownership pursuant to Section 5(a)

of the Submerged Lands Act, which excepts "all lands expressly retained by * * * the United States when the State entered the Union." 43 U.S.C. 1313(a). But if the Court concludes that there are doubts about whether Section 6(e) of the Alaska Statehood Act and Section 5(a) of the Submerged Lands Act apply to the lands in question, those doubts must be resolved in favor of the United States.

Alaska's claim to ownership of submerged lands beneath the territorial sea ultimately rests on the federal land grants contained in the Alaska Statehood Act and (by reference) the Submerged Lands Act. See pages 37-38, *supra*. Under firmly established law, those Acts must be construed in favor of the federal sovereign. This Court has adopted and uniformly adhered to

the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.

Watt v. Western Nuclear, Inc., 462 U.S. 36, 59 (1983); see, e.g., *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978); *Grand River Dam Authority*, 363 U.S. at 235; *Union Pac. R.R.*, 353 U.S. at 116; *Caldwell v. United States*, 250 U.S. 14, 20 (1919); *Northern Pac. Ry. v. Soderberg*, 188 U.S. 526, 534 (1903); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 738-739 (1832). There is no question that the foregoing rule of construction applies here. The Court expressly stated in *California ex rel. State Lands Commission* that the Submerged Lands Act should be interpreted in light of "the principle that federal grants are to be construed strictly in favor of

the United States." 457 U.S. at 287 (citing *Grand River Dam Authority, supra*, and *Union Pac. R.R., supra*). See page 36, *supra*.

That rule of construction takes on special significance in the case of submerged lands. As this Court has explained, the United States has a compelling national interest in lands beneath the territorial or so-called marginal sea:

The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved.

Louisiana, 339 U.S. at 704. Accord *Maine*, 420 U.S. at 520-522; *Texas*, 339 U.S. at 719; *California*, 332 U.S. at 36. Since the time of this Court's decision in *California*, Congress has "embraced rather than repudiated" the premise that the United States has a paramount sovereign interest in those waters. *Maine*, 420 U.S. at 524. Hence, the associated submerged lands continue to be "strongly identified with the sovereign power of government." *Montana*, 450 U.S. at 552. Consequently, all federal land grants, including those set out in statehood Acts and the Submerged Lands Act, remain subject to a "strong presumption" that the United States has retained its title to the submerged lands. See *ibid.* See pages 33-34, *supra*.

The presumption favoring federal retention of submerged lands arises as a matter of constitutional principle, but it is also sound under principles of federalism. If Congress leaves any substantial doubt respecting its intention to convey lands that are strongly imbued with a national interest, then this Court should presume that Congress has retained those lands for the benefit of the general citizenry. If

Congress did in fact intend to convey those lands, it can always do so at a later time through clear and unambiguous language. But if this Court mistakenly construes a conveyance as disposing of lands that Congress did not in fact intend to convey, the lands are lost to the Nation's citizens.

The Special Master recognized the rule of construction that we urge, stating that, "[f]or lands under territorial waters, * * * the applicable presumption is in favor of the United States." Report 456; see *id.* at 390-394. But the Master overlooked the relevance of that presumption in his analysis of Section 6(e) of the Alaska Statehood Act. He acknowledged that his construction of the text of that statutory provision did not dispositively resolve the issue in favor of Alaska, stating:

One might still question whether this reading is the best one, since the words "otherwise set apart" do describe the effect of an application under the regulation.

Report 464. He nevertheless ultimately resolved the question against the interest of the United States without considering the presumption favoring federal retention of the submerged lands. *Id.* at 467. Even if the Master had thought that Section 6(e) is less than clear, he should have recognized that, at the very least, it raised sufficient doubts respecting conveyance to prevent transfer of the lands out of federal ownership. Indeed, there is substantial evidence of congressional intent, beyond the language of Section 6(e), to justify a holding of federal retention of the submerged lands at issue.

The Secretary's administrative segregation of lands for the Arctic Wildlife Range received wide

publicity. See Report 483 (citing U.S. Exh. 12 (press release and map)). During Congress's consideration of Alaska's admission to the Union, the Secretary of the Interior informed Congress of the pending application, and he submitted maps showing the area as a federal enclave embracing submerged lands. See U.S. Exh. 61. Hence, Members of Congress understood that the Interior Department had "withdr[awn] temporarily some 9 million acres of lands along the Canada-Alaska border as the proposed Arctic Wildlife Range." See 104 Cong. Rec. 12,257-12,258 (1958) (Rep. Saylor). It is reasonable to conclude that Congress expected that Section 6(e) would retain in federal ownership the lands contained within the Range boundaries. As the Master acknowledged, Members of Congress "might have considered the proviso broad enough to cover lands segregated by a withdrawal application." Report 466.

The presumption in favor of federal retention has added force in this case because of the strong federal interest in retaining those submerged lands in federal ownership for their intended use. As the Master found, the Arctic Wildlife Range was proposed and created to protect that region's unique wildlife habitat, Report 485-490, including "the lagoons and the mouths of rivers," *id.* at 490. The application included documentation that specifically recognized the importance of lagoon and river habitat, stating in pertinent part:

The river bottoms with their willow thickets furnish habitat for moose. This section of the sea-coast provides habitat for polar bears, Arctic foxes, seals, and whales.

Id. at 487; see also *id.* at 489 (citing "undisputed evidence that polar bears use the lagoon areas for feeding and that seals have been seen in both lagoons and rivers"). Accordingly, it is reasonable to presume that Congress did not intend to convey those lands to the States for uses that would be potentially inconsistent with the planned federal wildlife refuge.

In light of the foregoing considerations, even if this Court shares the Master's concern that Section 6(e)—despite its directly pertinent language—might not have reached the Arctic Wildlife Range, the Court should nevertheless hold that the presumption in favor of federal retention has not been overcome. Congress can always expressly convey those lands to Alaska in the future, under whatever conditions Congress deems appropriate, if Congress should conclude that its previous intentions were misunderstood. As the enactment of the Submerged Lands Act demonstrates, Congress manifests great solicitude for legitimate state interests in offshore resources. There is no reason to expect that Congress "will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." *California*, 332 U.S. at 40.

D. Congress Also Retained Tidelands And Other Lands Beneath Inland Waters Within The Arctic Wildlife Range

The foregoing discussion has addressed the question of submerged lands beneath the territorial sea, which extend seaward from the low-water line along the coast. *California*, 332 U.S. at 30-31. Those lands do not include tidelands, which encompass the periodically submerged area between the high- and low-water lines. See *ibid.*; see also *Phillips Petroleum*

Co. v. Mississippi, 484 U.S. 469 (1988). Tidelands and other lands beneath inland waters involve an additional consideration.

The United States typically holds title to all submerged lands associated with the pre-statehood territories, including tidelands, lands beneath inland navigable waters, and lands beneath the territorial sea. But under the Equal Footing Doctrine, the United States holds title to the tidelands and land beneath inland navigable waters in trust for future States. *Pollard*, 44 U.S. (3 How.) at 228-229. Although the United States has the power to divest a State of such lands before statehood by conveying them away or otherwise preventing the passage of title, this Court does not "lightly infer" such action. *Utah Division of State Lands*, 482 U.S. at 197. The Court applies a "strong presumption" that Congress intends to retain tidelands for a future State; Congress must "definitely declare or otherwise make very plain" its intention to defeat the State's title. *Id.* at 197-198, 202, 209. In effect, the State receives the benefit of the same presumption favoring retention that applies to submerged lands that the United States' retains for its own sovereign use. See pages 32-34, *supra*.

The United States argued before the Special Master that the United States had divested the State of Alaska of title to tidelands and other lands beneath coastal inland waters within the proposed Arctic Wildlife Range by reserving them for the Range. The Master found that, if Section 6(e) had retained the Range in federal ownership, then the lands embraced by that retention included all of the submerged lands at issue. Report 495-499. Applying this Court's reasoning in *Utah Division of State Lands*, *supra*, and *Montana v. United States*, *supra*, the Master con-

cluded that the United States had carried its burden of putting forward "strong evidence of intent to make the lands part of the federal reservation" and had demonstrated an "affirmative intent to defeat the State's title to the lands." Report 496. Hence, if the Court concludes, as we urge, that Section 6(e) "expressly retained" the Arctic Wildlife Range in federal ownership, it should rule that the United States also retains title to the tidelands and other coastal inland waters within the boundary of the Arctic Wildlife Range. *Id.* at 499.

CONCLUSION

The Court should reject the Special Master's recommendation that the application for withdrawal and creation of the Arctic Wildlife Range did not withhold submerged lands from Alaska.

Respectfully submitted.

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APPENDIX

1. The Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, provides in relevant part:

The State Parties to this Convention Have agreed as follows:

Part I

TERRITORIAL SEA

Section I. General

Article 1

1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

* * * * *

Section II. Limits of the Territorial Sea

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 4

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method

of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage.

5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

2. Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the

high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters.

Article 6

The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.

Article 7

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn be-

tween these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

Article 8

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

* * * * *

Article 10

1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Article 11

1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that ele-

vation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

* * * * *

Article 13

If a river flows directly into the sea, the baseline shall be a straight line across the mouth of the river between points on the low-tide line of its banks.

* * * * *

2. The Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), provides in pertinent part:

* * * * *

Sec. 5. The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

Sec. 6. * * * * *

(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48

U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency: * * * *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. * * *

* * * * *

(m) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

* * * * *

3. The Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, provides in pertinent part:

SUBCHAPTER I—GENERAL PROVISIONS

§ 1301. Definitions

When used in this subchapter and subchapter II of this chapter—

(a) The term “lands beneath navigable waters” means—

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordi-

nary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles,* and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term “boundaries” includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term “boundaries” or the term “lands beneath navigable waters” be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico, except that any boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall

* So in original. Probably should be a semicolon.

remain immobilized at the coordinates provided under such decree and shall not be ambulatory;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * * * *

SUBCHAPTER II—LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

§ 1311. Rights of States

- (a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

* * * * *

§ 1313. Exceptions from operation of section 1311 of this title

There is excepted from the operation of section 1311 of this title—

- (a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

* * * * *

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

ON EXCEPTIONS TO THE REPORT
OF THE SPECIAL MASTER

**BRIEF FOR THE UNITED STATES IN OPPOSITION
TO THE EXCEPTIONS OF THE STATE OF ALASKA**

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QUESTIONS PRESENTED

The exceptions of the State of Alaska to the Report of the Special Master pose the following three questions:

1. Whether the coastline of the United States and the State of Alaska in the area of the Arctic Ocean should be determined by Alaska's proposed "ten-mile" rule.

2. Whether an offshore feature known as Dinkum Sands, which is frequently submerged by mean high water, is an island for purposes of locating the coastline.

3. Whether the United States has retained title to coastal submerged lands within the National Petroleum Reserve in Alaska.

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INTRODUCTION AND SUMMARY OF ARGUMENT

This original action presents a dispute between the United States and the State of Alaska over the ownership of lands beneath the tidal waters along the Arctic coast of Alaska. The Special Master has prepared a comprehensive report setting out his analysis and recommended resolution of the matter. The United States has filed one exception to his recommendations. The Brief for the United States in Support of Exception (U.S. Except. Br.) summarizes the Special Master's Report and explains the basis for that exception. The State of Alaska has filed three exceptions to the recommendations of the Special Master. This brief responds to those exceptions.

I. The Special Master has properly recommended that the Court reject Alaska's contention that the State's entitlement to submerged lands along the Arctic coast should be determined on the basis of a "ten-mile" rule, which Alaska contends represented the official policy of the United States at the time of Alaska's admission to the Union. See Report 19-175.

This Court concluded in *United States v. California*, 381 U.S. 139 (1965) (*California II*), that the Convention on the Territorial Sea and the Contiguous Zone, done, Apr. 29, 1958, 15 U.S.T. 1606, provides the controlling legal principles for determining the limits of a State's coastal inland waters. 381 U.S. at 165. The Court specifically rejected the argument, virtually identical to Alaska's contention here, that a State's coastal inland waters should be determined on the basis of the State's historical understandings at the time of statehood. See *id.* at 150-151, 157-160, 161-165. Since that time, the Court has consistently relied on the Convention to determine the limits of coastal inland waters, and it should not depart from that practice in this case.

Under the Convention, the United States' historic delimitation policies and practices remain relevant, but in a more specific sense than Alaska urges. The Convention allows a State to claim "historic" inland waters, Art. 7(6), 15 U.S.T. 1609, but the State must show that they comprise an area "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 101 (1985). Alaska has conceded that it cannot show that the areas in question constitute historic inland waters. See Report 44 n.13, 51. Hence, Alaska cannot claim any entitlement to the associated submerged lands. Because Alaska's assertions respecting the United States' historic

practices are not sufficient to establish a claim of historic inland waters under Article 7(6), they are also insufficient to show that the United States' adherence to the Convention's principles has impermissibly contracted Alaska's recognized territory. See *Alabama and Mississippi Boundary Case*, 470 U.S. at 111-112.

In this case, the Special Master assumed for purposes of argument that Alaska could claim a contraction of its recognized territory without showing its entitlement to that property under Article 7(6)'s historic inland waters test. See Report 52. He concluded, however, that Alaska must show that the United States had a "well-established and well-defined rule for inland water delimitation to imply such a claim." *Ibid.* The Master exhaustively evaluated the statements and positions of various United States officials over time, *id.* at 52-175, and he concluded that "[t]he evidence plainly shows that, as of Alaska's statehood, the United States had not developed a general policy of claiming as inland waters any waters behind islands that satisfied a ten-mile rule," *id.* at 127. See also *id.* at 141. Hence, even if this Court were to depart from its use of the Convention to determine the limits of coastal inland waters, Alaska has not made a satisfactory showing in this case.

II. The Special Master has also properly recommended that an offshore feature known as Dinkum Sands, which is regularly submerged by high tide, is not an island for purposes of locating the coastline. See Report 227-310.

The parties agree that the status of Dinkum Sands should be based on Article 10(1) of the Convention, which defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." 15 U.S.T. 1609. After carefully examining the text and drafting history of the Convention, the Master properly concluded that Article 10(1) "requires an island to be

'above water at high tide' at least 'generally,' 'normally,' or 'usually.'" Report 309. His interpretive approach is consistent with that of the Court in *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 40-47 (1969), where the Court construed Article 11's treatment of low-tide elevations. Alaska is mistaken in its argument that Dinkum Sands is analogous to "mudlumps" in the Mississippi River Delta, which Alaska asserts are islands. The Master found that there is no evidence that the mudlumps exhibit behavior analogous to Dinkum Sands, which regularly oscillates above and below mean high water. Report 291-293 & n.49. Alaska's reliance on *The Anna*, 165 Eng. Rep. 809 (1805), and other old cases is misplaced; they shed no light on the meaning of the 1958 Convention.

The Master is also correct in his factual findings respecting Dinkum Sands. Dinkum Sands is not merely "sometimes" or "occasionally" submerged. Alaska Except. Br. 45, 51. Based on the evidence, the Master concluded that Dinkum Sands is "frequently below mean high water and therefore does not meet the standard for an island." Report 309. Alaska's contrary characterization relies on a 1949-1950 survey. Subsequent observations beginning in 1955 have shown that the survey cannot be relied upon to characterize Dinkum Sands as an island. See *id.* at 240-244. Alaska makes no mention of the parties' \$2.8 million joint monitoring project, which was specifically designed to provide factual data to assess Dinkum Sands' elevation with respect to mean high water. The Master correctly concluded, based on the joint monitoring study and other voluminous evidence, that Dinkum Sands "frequently slumps below the high water datum" and is therefore not an island under Article 10(1) of the Convention. *Id.* at 309.

The Special Master also properly recommended against adopting the suggestion that Dinkum Sands be deemed an

island when it is above mean high water but not when it is below. There is no clear precedent in international law for "occasional" islands. Treatment of Dinkum Sands as a temporary island, which would result in unpredictable extensions and contractions of the territorial sea on a weekly or monthly basis, would pose numerous practical problems. Furthermore, that approach is not required under domestic law. Congress has specifically provided that this Court may fix federal-state boundaries through its decrees. See 43 U.S.C. 1301(b). The treatment of Dinkum Sands as a temporary island would require a costly and timely monitoring program that would likely be subject to continuing disputes over the scientific methodology and results. This case demonstrates the undesirability of requiring permanent monitoring of a capricious coastal feature in an inclement Arctic region.

III. The Special Master correctly recommended that the United States has lawfully retained title to coastal submerged lands within the National Petroleum Reserve in Alaska through a 1923 land withdrawal that expressly included the submerged lands within its seaward boundary. Report 343-446.

Alaska's contention that it owns the submerged lands within the National Petroleum Reserve is a complete reversal of its position at the outset of the litigation. See Report 346. As the Master explained, the United States owns those lands because it expressly retained them through an Executive Order withdrawal, which Congress specifically recognized and ratified in the Alaska Statehood Act. As the Master further explained, there is a strong presumption that the United States retained the submerged lands beneath the territorial sea, where its power is "paramount" (*United States v. California*, 332 U.S. 19, 36 (1947) (*California I*)). See Report 394. But even if the withdrawal is construed under the "equal

footing" presumptions that this Court has applied to non-coastal inland waters, see *Utah Div. of State Lands v. United States*, 482 U.S. 193, 200-202 (1987), the United States clearly retained title. See Report 445.

Alaska is wrong at the outset in contending that the Pickett Act, ch. 421, 36 Stat. 847, did not authorize the President to withdraw the submerged lands. The Master rejected that argument, explaining that Alaska's construction is inconsistent with both the language and the object of the Act. See Report 404-416. It is particularly significant that the Pickett Act authorized the President to set aside lands for the purpose of creating petroleum reserves for the Navy's use. Such oil reserves exist in underground deposits that extend indiscriminately beneath uplands and submerged lands and cannot be preserved through reservation of the uplands alone. The Act's objectives would have been thwarted if it had allowed withdrawal of only the uplands. See *id.* at 410-416.

Alaska is also wrong in suggesting that there was no "public exigency" justifying the retention of submerged lands. The United States' national security needs provide an ample basis for the United States to reserve submerged lands. See Report 417-430. Alaska is additionally mistaken in its assertion that Section 11(b) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 347, is not affirmative evidence that Congress intended to defeat Alaska's title. Section 11(b), which expressly states that the United States owns and retains exclusive jurisdiction over the National Petroleum Reserve, unambiguously expresses Congress's intention to withhold from Alaska all lands to the limit of the Reserve's seaward boundary. See Report 430-440.

There is no merit to Alaska's assertion that the Equal Footing Doctrine prohibits the United States from retaining title to submerged lands through a statehood act.

Alaska does not contest that Congress can retain submerged lands for appropriate public purposes. If that is so, then Congress can exercise that power through the legislation of its choice. Indeed, a statehood act is a particularly appropriate vehicle for Congress to manifest its intention to retain submerged lands rather than let them pass to the new State. There is also no merit to Alaska's contention that the United States is entitled to something less than fee title to the submerged lands. The decision whether to retain the full fee is a matter for Congress, which indicated its intention to retain full ownership of all of the lands within the National Petroleum Reserve. See Report 440-445.

ARGUMENT

I. ALASKA'S ENTITLEMENT TO LANDS BENEATH COASTAL INLAND WATERS SHOULD BE DETERMINED BY THE PRINCIPLES SET OUT IN THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE, RATHER THAN BY ALASKA'S PROPOSED "TEN-MILE" RULE

The Special Master carefully considered Alaska's entitlement to submerged lands in the vicinity of a series of barrier islands in the Arctic Ocean that lie at distances ranging from less than one mile to more than seven miles from the mainland and each other. See Report 3, Fig. 1.1 (map). He concluded that Alaska's right to submerged lands in such areas should be determined on the basis of the Submerged Lands Act of 1953 (SLA), 43 U.S.C. 1301 *et seq.*, and the mandatory provisions of the Convention on the Territorial Sea and the Contiguous Zone, done, Apr. 29, 1958, 15 U.S.T. 1606. Under those provisions, Alaska is entitled to submerged lands extending three miles seaward from the low-water line of the mainland and each of

the islands, 43 U.S.C. 1301(c); Art. 3, 15 U.S.T. 1608, and from the limits of inland waters, which are determined under the Convention's provisions governing the closing of bays, Art. 7, 15 U.S.T. 1609. See Report 19-175; U.S. Except. Br. 5-9 (summarizing the Master's findings).¹

Alaska contends (Alaska Except. Br. 7-43) that the Special Master erred in determining the extent of the State's inland waters in the vicinity of the barrier islands. Alaska argued before the Master that all of the waters between the islands and the mainland are inland waters and that Alaska is therefore entitled to all of the underlying submerged lands. Alaska offered two separate theories in support of that claim. First, Alaska asserted that its entitlement should be determined by the optional method of "straight baselines" set forth in Article 4 of the Convention, 15 U.S.T. 1608. See Report 25-28 (Questions 2 and 12). In the alternative, Alaska asserted that its entitlement should be determined by a rule, which it characterized as the United States' historic policy, that areas enclosed by barrier islands less than ten miles apart are inland waters. See *id.* at 29-30 (Questions 3 and 13). The Master has recommended that this Court reject both theories, *id.* at 174-175, 503, and Alaska excepts only from his recommendation against adopting the "ten-mile" rule, Alaska Except. Br. 7.²

As we explain below, Alaska's exception should be overruled. This Court has held that the Convention provides

¹ See also Report 24, Fig. 3.2 (map depicting the United States' position in the Leased Area); *id.* at 28, Fig. 3.4 (map depicting Alaska's position in the Leased Area).

² Alaska raised a third theory, one of "assimilation," which applied to only some of the submerged lands in question. Report 30-32 (Question 4). The Special Master has recommended that the Court reject that theory, see *id.* at 174-175, 503, and Alaska has not excepted from that recommendation.

the controlling principles for determining the seaward limits of inland waters for purposes of the Submerged Lands Act. See pages 9-12, *infra*. The United States' historic policies and practices are relevant under the Convention only to a claim of "historic" inland waters, and Alaska expressly disavowed such a claim here. See pages 12-17, *infra*. Moreover, as the Master comprehensively explained, even assuming *arguendo* that Alaska could claim coastal inland waters apart from the Convention's framework, there was no settled and formal position of the United States in support of the "ten-mile" rule of the sort that could justify a departure from the Convention's requirements. See pages 18-27, *infra*.³

A. This Court Has Ruled That A State's Entitlement To Land Beneath Coastal Inland Waters Shall Be Determined On The Basis Of The Convention

This Court held in a landmark case, *United States v. California*, 332 U.S. 19 (1947) (*California I*), that the United States, rather than any individual State, has paramount power over the submerged lands seaward of the coastline, in the area known as the territorial sea. *Id.* at 36. Congress later enacted the Submerged Lands Act, which granted the States title to a specified measure of the submerged land seaward of the coastline. That Act defined the "coast line" as "the line of ordinary low water

³ Alaska's characterization of the United States' current practice as "strictly applying the arcs-of-circles method" (Alaska Except. Br. 4-5) is inaccurate if the State means to suggest that the United States determines the limit of the State's Submerged Lands Act grant strictly from the actual low-water mark of the mainland and islands. The United States also draws the boundary from the limits of inland waters. But, unlike Alaska, the United States relies on the Convention to determine those limits.

along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." SLA § 2(c), 43 U.S.C. 1301(c). But that Act did not establish principles for drawing the closing lines separating coastal inland waters (such as bays and inlets) from the territorial sea. See Report 15-16.

This Court addressed the question of inland waters in *United States v. California*, 381 U.S. 139 (1965) (*California II*). The Court ruled that the Convention on the Territorial Sea and the Contiguous Zone supplies the principles for determining the extent of inland waters under the Submerged Lands Act. *Id.* at 161-167. Under the Convention's principles, a coastal feature qualifies as inland waters if (a) it satisfies the requirements of a juridical bay, including a 24-mile closing rule and a "semi-circle" test; or (b) it qualifies as "historic" inland waters. Art. 7, 15 U.S.T. 1609. See *California II*, 381 U.S. at 169-175. The Convention also gives a nation the option of using "straight baselines" for determining seaward boundaries if its "coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." Art. 4, 15 U.S.T. 1608. But the United States has elected not to use the optional straight-baselines method, and hence a State cannot rely on that methodology to extend the scope of its inland waters. *California II*, 381 U.S. at 167-169. See Report 17-18, 44-45.

The Court adopted its Convention-based approach over the objections of both California and the United States. California had argued that inland water determinations should be made on the basis of each State's understanding of its inland waters at the time of the State's admission to the Union. See *California II*, 381 U.S. at 149. The United States, by contrast, had argued that the determinations should be made on the basis of an assessment of inland water principles as of 1953, when Congress enacted the

Submerged Lands Act. See *id.* at 149, 164. The Court concluded, however, that Congress had not intended either of those results, *id.* at 150-165, but, instead, had "left the responsibility for defining inland waters to this Court," *id.* at 164. The Court accordingly announced a controlling principle:

It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act.

Id. at 165 (footnote omitted). The Court determined that fixing the meaning of inland waters in terms of the Convention for purposes of the Submerged Lands Act would "fulfill the requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States." *Id.* at 167. See Report 17-18.

Alaska is accordingly wrong in its fundamental premise that Alaska's boundaries "were fixed by the United States' policy in 1959 of enclosing as inland waters areas between the mainland and fringing islands less than ten miles apart." Alaska Exempt. Br. 10. The Court's decision in *California II* categorically holds that the extent of each State's inland waters shall be determined by the rules set forth in the Convention, and not by any perceived policies at the time of an individual State's admission to the Union. Since the *California II* decision, the Court has consistently followed the Convention's principles in coastal inland water disputes, including a previous dispute between the United States and Alaska. See *United States*

v. *Maine*, 475 U.S. 89, 93-94 (1986); *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 98 (1985); *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 513 (1985); *United States v. California*, 447 U.S. 1, 5, 9 (1980) (*California IV*); *United States v. Alaska*, 422 U.S. 184, 188-189 (1975); *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 35 (1969). There is no reason to depart from that settled practice now.⁴

B. Under The Convention, The United States' Past Policies And Practices Remain Relevant To Historic Inland Waters Claims, But Alaska Has Not Made An Historic Inland Waters Claim In This Case

The Court's decision in *California II* requires a State to base its inland waters claim on the principles set forth in the Convention. As the Court recognized, the Convention takes into account historic policies and practices in a specific, but limited way. Under the Convention, a State may establish that an enclosed coastal area is inland waters by proving that it satisfies the requirements of a juridical bay: (1) the feature must be a well-marked indentation into the mainland whose area is as large as, or larger than, that of a semi-circle whose diameter is drawn across the mouth of the indentation; and (2) the closing line between the low-water marks of the natural entrance points may not exceed 24 miles. Art. 7(2) and (4), 15 U.S.T.

⁴ Experience has established the wisdom of the Court's decision in *California II*. The Convention has provided authoritative rules for resolving inland waters disputes and "many of the lesser problems related to coastlines." 381 U.S. at 165. Furthermore, as we show below, use of the Convention will limit the occasion for litigation over whether and what historic delimitation policies were in place when each of the coastal States entered the Union to those situations in which a State has a claim to "historic" inland waters under Article 7(6) of the Convention.

1609. See *California II*, 381 U.S. at 169-172; see also, e.g., Report 176-226; U.S. Except. Br. 9-11. Alternatively, a State may establish that the area constitutes "historic" inland waters. Art. 7(6), 15 U.S.T. 1609. See *California II*, 381 U.S. at 172-175; see also, e.g., *Alabama and Mississippi Boundary Case*, 470 U.S. at 99-101 & n.2.⁵

The Convention does not define what features constitute "historic" inland waters, but this Court stated in the *Alabama and Mississippi Boundary Case* that they comprise an area "over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations." 470 U.S. at 101. The Court additionally stated that "at least three factors are to be taken into consideration in determining whether a body of water is a historic bay: (1) the exercise of authority over the area by the claiming nation; (2) the continuity of this exercise of authority; and (3) the acquiescence of foreign nations." *Id.* at 101-102. The Court looked to a variety of evidence bearing on those factors in that case, see *id.* at 102-111, and concluded that the evidence, "considered in its entirety, is sufficient to establish that Mississippi Sound constitutes a historic bay," *id.* at 115.

Alaska cites the *Alabama and Mississippi Boundary Case* as showing that the United States had a past policy that controls the outcome in this case. Alaska Except. Br. 7. Alaska relies specifically on the Court's statement that, between 1903 and 1961 (when the United States ratified the Convention), "the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely

⁵ As the Court noted, Article 7(6)'s provisions respecting "historic bays" apply to areas that strictly speaking are not "bays." 470 U.S. at 101 n.2. The Court left open "how unlike a juridical bay a body of water can be and still qualify as a historic bay." *Ibid.*

grouped that no entrance exceeded 10 geographical miles." 470 U.S. at 106. Alaska argues that the Court's observation "resolved" the issue here and establishes that the State is entitled to submerged lands in the Arctic Ocean fitting that description. Alaska Except. Br. 7. Alaska overlooks, however, the context in which that observation was made.

The Court discussed the United States' past policy in the specific and limited context of whether Mississippi Sound qualified as an *historic bay* under Article 7(6) of the Convention. See 470 U.S. at 100-101. It considered the United States' past expressions and practices as only one of numerous sources of evidence bearing on the three-factor test for historic bays. See *id.* at 102-111.⁶ Indeed, the Court appeared to agree with the United States that what the Court described as a general policy would not, by itself, establish "a sufficiently specific claim to the Sound as inland waters to establish it as a historic bay." *Id.* at 107. The Court concluded, however, that the policy was relevant in "the present case" because "the general principles in fact were coupled with specific assertions of the status of the Sound as inland waters." *Ibid.*⁷

In this case, by contrast, Alaska has specifically disclaimed that Stefansson Sound and the other disputed

⁶ The Court also considered, for example, the commercial and strategic importance of the Sound (470 U.S. at 102), the depth and geographic configuration of the Sound (*id.* at 102-103), historic use of the Sound as an inland waterway (*id.* at 103), and federal navigational improvements and military defense of the Sound (*id.* at 103-105).

⁷ The Court specifically pointed to its own past description of the Sound as inland waters in *Louisiana v. Mississippi*, 202 U.S. 1, 48 (1906), and the United States' concessions in earlier phases of the litigation, which together "represent[ed] a public acknowledgement of the official view that Mississippi Sound constitutes inland waters of the Nation." 470 U.S. at 110.

areas qualify as historic inland waters under Article 7(6) of the Convention. Report 44 n.13, 51. As the Master stated:

Alaska points out that it is not attempting to show that the waters inside the barrier islands qualify as historic bays under Article 7(6) of the Convention. Rather, it seeks to show that these waters were inland by virtue of a general delimitation system that the United States employed at the times significant to the development of Alaska's rights.

Id. at 51. In other words, Alaska eschews the Convention's test for historic inland waters and offers a different methodology. Alaska's position is squarely inconsistent with this Court's decision in *California II*, which held that the Convention shall provide the rules for establishing inland waters. 381 U.S. at 165.

Under *California II*, if Alaska wishes to demonstrate that an area constitutes inland waters based on the United States' past practices, then it must come forward with sufficient additional proof that the area satisfies the test for "historic" inland waters under Article 7(6) of the Convention. If Alaska were correct that a State may rely on historic practices alone, divorced from the Convention's requirements, then this Court would have to discard the approach that it adopted in *California II* and has followed in all subsequent inland waters delimitation cases, which insist on adherence to the Convention's requirements. See, e.g., *Maine*, 475 U.S. at 95, 105 (recognizing that, if a State can claim inland waters on the basis of "ancient title," the claim must be predicated on Article 7(6) of the Convention).

Alaska argues that there are dicta in *California II* that leave open an avenue for circumventing the Convention's requirements. As noted above, the Court observed that

the Convention allows, but does not require, a nation to use "straight baselines" to delimit inland waters if the mainland is "deeply indented" or surrounded by "a fringe of islands," Art. 4, 15 U.S.T. 1608. See *California II*, 381 U.S. at 167-168. The Court concluded that the choice whether to use straight baselines rests with the United States, but additionally observed as follows:

The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable.

Id. at 168. Relying on the dicta, Alaska argues that it is entitled to demonstrate, entirely apart from Article 7(6) of the Convention, that the United States' failure to adhere to its purported historic delimitation policy has resulted in a contraction of Alaska's "recognized territory." Alaska Exempt. Br. 10-13.

Alaska's suggested approach is unwarranted, because this Court has fully addressed its concern over the potential "contraction of a State's recognized territory" through the framework of the Convention. Under *California II*, the Convention establishes the controlling standards for determining what coastal areas are in fact inland waters and therefore a part of a State's "recognized territory." If a State cannot establish that an area qualifies as historic inland waters under Article 7(6) of the Convention, then the State cannot justifiably claim that the area is part of its "recognized territory." But if a State does demonstrate that an area qualifies as historic inland waters, then the United States cannot divest the State

of the associated submerged lands. See *Alabama and Mississippi Boundary Case*, 470 U.S. at 111-112.⁸

In this case, Alaska has never suggested that Stefansson Sound and the other disputed areas qualify as historic inland waters under Article 7(6) of the Convention. See Report 44 n.13, 51. Cf. *United States v. Alaska*, 422 U.S. 184 (1975) (rejecting Alaska's claim that Cook Inlet, near Anchorage, is an historic bay). Thus, Alaska has failed to establish that the lands in question are "recognized territory," and Alaska has no basis for arguing that the United States' adherence to the normal baseline provisions of the Convention has impermissibly contracted Alaska's recognized territory.⁹

⁸ The Court specifically held in the *Alabama and Mississippi Boundary Case* that the United States' international disclaimer of territory was insufficient to divest the State of Mississippi of its claim of "historic title" that "had ripened prior to the United States' ratification of the Convention in 1961 and prior to its disclaimer of the inland water status of the Sound in 1971." 470 U.S. at 112. Accord *Louisiana Boundary Case*, 394 U.S. at 77 n.104 (United States cannot "prevent recognition of a historic title [under Article 7(6)] which may have already ripened because of past events"); compare *California II*, 381 U.S. at 175 (accepting a federal disclaimer where the State had failed to demonstrate historic title under the Convention).

⁹ As noted above, the Court expressed its concern over a contraction of recognized territory in the specific context of the United States' decision against using the optional method of straight baselines in an area where that method would be permissible. See *California II*, 381 U.S. at 168. In this case, Alaska has pressed its argument before this Court on the basis of the "ten-mile" rule. But the same result would follow if Alaska were contending (as it did before the Special Master, Report 25-28) that the United States is obligated to draw straight baselines along the Arctic coast. As the Special Master recognized (*id.* at 45, 48 n.14), the United States has followed a consistent practice of refusing to adopt straight baselines. See *Maine*, 475 U.S. at 94; *Alabama and Mississippi Boundary Case*, 470 U.S. at 99; *United States v. Louisiana (Louisiana Boundary Case)*, 420 U.S. 529

C. Even If Alaska Could Base A Claim To Inland Waters On Principles Other Than Those Set Out In The Convention, It Has Not Done So Here

In this case, the Special Master generously "assume[d] arguendo that something less than the disclaimer of a historic bay might amount to an impermissible contraction of a state's territory." Report 52. He nevertheless concluded that Alaska had failed to demonstrate such a contraction in this case. *Id.* at 52-175. For the reasons stated above, the Court does not need to decide that issue: Alaska cannot claim a contraction of its "recognized territory" unless it first demonstrates under the Convention that the area in question qualifies as historic inland waters. But if the Court decides to consider the issue, it will find that the Master's decision is correct. Alaska cannot claim that the United States' adherence to the Convention resulted in a contraction of Alaska's recognized territory, because the United States did not have a sufficiently "well-established and well-defined rule for inland water delimitation to imply such a claim." *Id.* at 52.

The Master conducted a scholarly and exhaustive examination into the history of the United States' statements and practices respecting the delimitation of inland waters. His examination shows that, during the Nation's

(1975) (accepting the Report of the Special Master); see also *Louisiana Boundary Case*, 394 U.S. at 72-73; *California II*, 381 U.S. 167-169. Alaska and the United States stipulated before trial that the United States has not drawn straight baselines in the area in question. Report 45 (citing Joint Statement 7). The United States' adherence to that practice has not contracted Alaska's "recognized territory" because, as explained above, Alaska has not proved an historic inland waters claim under Article 7(6) of the Convention. Alaska cannot avoid that result by attempting to piece together past statements or positions of various United States officials that fall short of satisfying the standards of Article 7(6).

history, various United States officials have occasionally alluded to variants of a "ten-mile" rule, as well as other methods, for delimiting coastlines, but that those episodic references did not amount to a consistent or sufficiently well-defined policy for Alaska to assert a claim to "recognized territory" for the areas at issue along the Arctic coast. See Report 56-70 (experience before 1929); *id.* at 71-83 (1929 to 1949); *id.* at 83-109 (1950 to 1952); *id.* at 109-141 (1953 to Alaska's statehood); *id.* at 141-172 (post-statehood developments).

Alaska's contrary depiction of history (Alaska Except. Br. 16-39) is not persuasive when viewed against the Master's detailed analysis, which we commend to the Court's careful review. We highlight several specific points to demonstrate the shortcomings of Alaska's arguments.

1. Alaska insists that the Court's general observations in the *Alabama and Mississippi Boundary Case* respecting the United States' past views and practices establish that the United States had a "ten-mile" policy that is binding in this case. The Master explained why that is not so. Report 52-55. The Court's observations in that case respecting United States policy were made in the specific context of an historic inland waters determination under Article 7(6) of the Convention. The question of the exact nature of the United States' past practices "was not strictly necessary to the decision" and "was not fully briefed." Report 54. Indeed, the Special Master in the *Alabama and Mississippi Boundary Case* had "quoted numerous statements of the pre-Convention policy"; there "is considerable variation among the statements"; and "he did not select any particular statement of policy as being more accurate or more authoritative than the others."

Ibid. (citing Report of Special Master Walter P. Armstrong, Jr., at 39-42, 48-53 (1984) (No. 9, Orig.)).¹⁰

The Special Master in this case examined the materials and arguments that were placed before the Court in the *Alabama and Mississippi Boundary Case*. He concluded:

Given this history, I do not believe that the Court in [that case] intended to pass upon what statement of the rule most accurately reflected United States policy regarding near-shore islands.

Report 55. The Court's decision in the *Alabama and Mississippi Boundary Case* confirms the Master's conclusion. As we noted above, the Court appeared to agree with the United States that the past delimitation practices of the United States, by themselves, did not provide a "sufficiently specific" basis for claiming Mississippi Sound as inland waters. 470 U.S. at 107. The Court indicated, instead, that the United States' past practices were a relevant consideration because "the general principles in fact were coupled with specific assertions of the status of the Sound as inland waters." *Ibid.*

In the *Alabama and Mississippi Boundary Case*, the question of historic delimitation practice was merely one of many considerations in the Article 7(6) inquiry, and the Court had no need to look beyond statements of "general principles." The same cannot be said here.¹¹ Moreover, if

¹⁰ Special Master Armstrong's Report in the *Alabama and Mississippi Boundary Case* and all of the other Master's Reports respecting coastal boundaries have been collected and reproduced in Michael W. Reed, G. Thomas Koester & John Briscoe, *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases 1949-1987* (1991) (*Submerged Lands Cases*).

¹¹ As the Master noted, "[f]or Mississippi Sound, the differences among statements apparently made no difference in result. For the northern coast of Alaska, that may not be the case." Report 55.

the Court decides to depart from its past decisions and to recognize historic inland waters claims based on considerations outside of the Convention framework, it should at least require that the State demonstrate that its claim is based on a "well-established and well-defined rule for inland water delimitation." Report 52. As the Special Master explained, "the exact nature of the United States' historic practice is a matter of some intricacy." *Id.* at 55. Hence, the Master was justified in conducting "a more detailed examination of the practice than might otherwise have seemed necessary." *Ibid.*¹²

2. The Master determined that, "before the Convention, the United States did sometimes enclose waters behind coastal islands as inland waters." Report 138. That determination is consistent with the Court's ultimate ruling in the *Alabama and Mississippi Boundary Case*, 470 U.S. at 115. But as the Master explained in his

¹² There is no merit in Alaska's argument (Alaska Except. Br. 8) that collateral estoppel bars that inquiry. As an initial matter, Alaska acknowledged before the Master that the United States is generally not subject to non-mutual collateral estoppel. See Report 30 (noting Alaska's acknowledgment of *United States v. Mendoza*, 464 U.S. 154, 163 (1984)). As a result, "Alaska d[id] not seek to invoke collateral estoppel against the United States," and instead "introduced evidence aimed at proving the ten-mile rule independently." Report 30, 53-54. In any event, as we have explained above, the Court's characterizations in the *Alabama and Mississippi Boundary Case* were made in the specific context of an "historic" inland waters dispute. The Court's observations concerning "general principles" do not have controlling legal significance in the situation presented here, where Alaska's novel claim could succeed only upon demonstrating the existence in the past of a "well-established and well-defined rule for inland water delimitation." *Id.* at 52.

Report, the United States' underlying policy was not consistent or well defined:

The evidence plainly shows that, as of Alaska's statehood, the United States had not developed a general policy of claiming as inland waters any waters behind islands that satisfied a ten-mile rule. At January 3, 1959, no such general rule had ever been announced as American policy, unless perhaps in the Alaska Boundary Arbitration of 1903. The rule that had been recently stated, in various forms, was a rule for straits to an inland sea. The latter was clearly not equivalent to a simple ten-mile rule for islands.

Report 127.

Contrary to Alaska's fundamental contention (Alaska Except. Br. 19), the Arbitration did not "crystallize" the United States' policy into "an explicit 10-mile rule for inland waters enclosed by islands." For example, the United States formally proposed principles to the League of Nations Conference for the Codification of International Law, held at the Hague in 1930, that did *not* include a ten-mile rule for inland waters. The United States instead proposed that individual islands would have their own three-mile belt of territorial sea and that any pockets or indentations of high sea created by that method would be assimilated to a nation's *territorial* waters, not its *inland* waters. See Report 71-75. The other materials cited by the Master further underscore that the United States never formally adopted, as an official and enduring position for the Nation, the ten-mile rule that Alaska urges.¹³

¹³ The 1903 Alaska Boundary Arbitration involved a dispute between the United States and Great Britain over the international boundary in southeastern Alaska. In the course of the arbitration, counsel for the United States had accepted the use of a ten-mile rule for closing bays. See Report 64-65. But the arbitration tribunal did not

The Master examined the consequences of that finding for Alaska's claims in this case. He stated:

I cannot regard it as established that the United States would have treated the disputed areas as inland waters at the time of Alaska's statehood. No occasion had arisen that required the United States to take a position on their status. No actual determination had been made. The principles that would govern the determination were vague and, as I shall discuss below, perhaps discretionary.

Report 140-141. That conclusion points up the distinction between this case and the *Alabama and Mississippi Boundary Case*, where "the general principles in fact were coupled with specific assertions of the status of the Sound as inland waters." 470 U.S. at 107.

decide the issue. See *id.* at 65. From that time until Alaska's statehood, United States officials regularly made statements that departed from or did not mention the ten-mile rule. See, e.g., *id.* at 68-70 (United States international commentary in 1929 that made no mention of ten-mile rule); *id.* at 71-75 (United States international proposals in 1930 supporting delimitation methodology that was inconsistent with the ten-mile rule); *id.* at 76-80 (United States domestic and international statements in 1949 supporting the 1930 proposals); *id.* at 98-103 (State Department letter in 1951 that set forth delimitation policies but made no mention of the ten-mile rule); *id.* at 105-107 (State Department letter in 1952 that stated delimitation policies inconsistent with the ten-mile rule); *id.* at 122-125 (State Department memorandum in 1957 that discussed delimitation policies but made no mention of the ten-mile rule). Indeed Alaska's own expert witness, Professor Jonathan Charney, acknowledged that there is no evidence that the United States closed either inland waters or territorial sea behind fringing islands even from 1903 to 1930. Tr. 3083. In fact, Professor Charney conceded that "it could not be shown that there was any formal, regularized decision by the United States as a whole as to what exactly its foreign-policy position was with respect to how to fix the baselines for measuring the territorial sea." Tr. 3095.

More fundamentally, the Master's conclusion is consistent with this Court's decision in *California II*. The Court concluded in that case that, when Congress enacted the Submerged Lands Act in 1953, "there was no international accord on any definition of inland waters, and the best evidence (although strenuously contested by California) of the position of the United States was the letters of the State Department which the Special Master refused to treat as conclusive." 381 U.S. at 164. The Court adopted the Convention's approach to resolve that very uncertainty. *Id.* at 164-165. The Court observed:

Before today's decision no one could say with assurance where lay the line of inland waters as contemplated by the Act; hence there could have been no tenable reliance on any particular line. After today that situation will have changed.

Id. at 166. The Special Master's exhaustive study of past positions and statements by various United States officials confirms the Court's observations and the soundness of its Convention-based approach to delimiting inland waters. Indeed, in the end, his analysis simply underscores that Alaska should not be able to claim an historic right to inland waters as "recognized territory" unless it can show under Article 7(6) of the Convention that they are historic inland waters.

3. Alaska contends that the United States "followed the 10-mile rule even after the Court adopted the Convention for Submerged Lands Act purposes" (Alaska Except. Br. 36-39) and "changed its position in 1971 for reasons unrelated to international relations" (*id.* at 39-40). Those contentions are without merit.

As we have explained above, in *California II*, the United States and California had argued against using the Convention to delimit inland waters, but the Court rejected

those arguments. See 381 U.S. at 161-165. Since the Court's decision in *California II*, the United States has adopted and followed the normal baseline provisions of the Convention to resolve inland water disputes. The United States has done so precisely because the Court concluded in *California II* that the Convention—and not any pre-Convention methodology—established the appropriate rules. The only exception arises from the United States' decision, shortly after *California II*, to honor a previous concession made in pending litigation.

At the time of the *California II* decision in 1965, the United States was engaged in continuing litigation with Louisiana respecting ownership of submerged lands in the Gulf of Mexico. See *United States v. Louisiana*, 363 U.S. 1 (1960). In 1961, the United States had proposed a closing line that, while not strictly based on a ten-mile rule, enclosed water bodies formed by fringing islands with openings of ten miles or less in the area of Chandeleur Sound. See Report 142-152. The United States had adhered to that line in 1961, notwithstanding the ratification of the Convention, as an "adherence to an earlier commitment." *Id.* at 150. In 1965, after the Court's decision in *California II*, the United States decided against withdrawing that particular concession. See *id.* at 155-157. As the Master recognized, the United States simply elected to treat the long-standing dispute over Chandeleur Sound as settled by a previous concession. Contrary to Alaska's assertions (Alaska Except. Br. 39), the United States was not following the ten-mile rule, much less committing the United States to such a rule in all circumstances in the future.¹⁴

¹⁴ The United States made clear in the formal stipulation concerning Chandeleur Sound that it made the concession "[f]or the sole purpose of expediting the ultimate resolution of this case, and without

There is also no merit to Alaska's separate contention (Alaska Except. Br. 39-40) that the United States has improperly declined to use the Convention's optional method of straight baselines. As noted above, the United States indeed has not elected to use that method. See page 10, *supra*. But as this Court has repeatedly recognized, that decision rests within the discretion of the United States. The United States has consistently followed a policy against the use of straight baselines. See note 9, *supra*. Alaska's speculation about the United States' motivations are beside the point. "This is not a situation in which the United States has created a contraction of Alaska's recognized territory in the Arctic; it is not a case in which the United States in effect used straight baselines but 'abandon[ed] that stance solely to gain advantage in a lawsuit. . . .' *Louisiana Boundary Case*, 394 U.S. at 73 n.97." Report 169.

Although Alaska complains of a contraction of its recognized territory, it is Alaska that seeks to expand its boundaries beyond what the Convention contemplates and place itself in a favored position vis-à-vis other States. Alaska urges application of a ten-mile closing rule based on the United States' purported pre-Convention policy at the time of Alaska's statehood (Alaska Except. Br. 10-13), even though similar geographic areas in other States have been held not to be inland waters. See Report 173. Furthermore, at the same time that Alaska has argued that its

deciding whether Chandeleur or Breton Sounds are inland waters." See Report of Special Master Walter P. Armstrong, Jr., at 63 (1974) (App. A-2 Stip.), *United States v. Louisiana* (No. 9, Orig.) (reproduced in *Submerged Lands Cases* 249). The United States also indicated that the agreement "is not based on the belief that these are historic inland waters or described by a system of straight baselines." *Id.* at 66 (reproduced in *Submerged Lands Cases* 252).

boundaries "were fixed by the United States' policy in 1959" (Alaska Except. Br. 10), Alaska has not hesitated to argue that it is entitled to the Convention's more inclusive 24-mile closing rule for juridical bays, such as Harrison Bay. Harrison Bay and other similar coastal features would not qualify as inland waters if they were subject to a pre-Convention policy of drawing ten-mile closing lines for bays and inlets. See Report 63-65.¹⁵

At bottom, there is no consistency to Alaska's position save the principle of maximizing the State's submerged lands grant.

II. DINKUM SANDS IS NOT AN ISLAND

The Submerged Lands Act grants to the coastal States submerged lands within three miles of the coastline of the mainland and offshore islands. See Report 15-18. Dinkum Sands is a small gravel and ice formation located between Cross and Narwahl Islands, about four to five miles from each and about eight miles from the mainland. See *id.* at 2, Fig. 1.1. The United States and Alaska disagree over whether Dinkum Sands is an island for purposes of determining Alaska's Submerged Lands Act grant. They agree, however, that the question is governed by Article 10(1) of the Convention on the Territorial Sea and the Contiguous Zone, which defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-

¹⁵ The use of a pre-Convention policy of drawing ten-mile closing lines would also affect the inland waters status of numerous other bays in Alaska, not at issue in this case, that are currently closed under the Convention's 24-mile rule. An inspection of official nautical charts would reveal that the following bays and inlets are subject to greater than ten-mile closing lines: Norton Bay; Kotzebue Sound; Nushagak Bay; Kvichak Bay; Stepovak Bay; Cold Bay; Uyak Bay; Uganik/Viekoda Bay; Chiniak Bay; Kachemak Bay; Kamishak Bay; Upper Cook Inlet; Resurrection Bay; and Prince William Sound.

tide." Art. 10(1), 15 U.S.T. 1609. See *California II*, 381 U.S. at 165; see also Report 227-230; U.S. Except. Br. 11-12.

Alaska objects (Alaska Except. Br. 43-56) to the Master's recommendation that Dinkum Sands is not an island under Article 10(1) of the Convention. See Report 230-310; *id.* at 503-504 (Question 5); U.S. Except. Br. 11-12 (summarizing the Master's findings). Alaska challenges the Master's legal conclusion that Article 10(1) "requires an island to be 'above water at high tide' at least 'generally,' 'normally,' or 'usually'" (Report 309). Alaska Except. Br. 45-51. Alaska also disputes his factual findings respecting Dinkum Sands, including his finding that it "is frequently below mean high water and therefore does not meet the standard for an island" (Report 309). Alaska Except. Br. 51-54. Finally, Alaska argues that Dinkum Sands should be treated as a temporary island in the unusual instances when it is not submerged. *Id.* at 54-56.

A. The Master Correctly Determined That Article 10(1) Of The Convention Includes As Islands Only Features That Are Normally Above Mean High Water

Article 10(1) of the Convention provides a definition of an island, but it does not explicitly address how that definition should be applied to a feature like Dinkum Sands, which Alaska concedes is at times completely submerged below mean high water. The Master therefore undertook an examination of how Article 10(1) should be applied in such a situation. He interpreted Article 10(1) in light of a detailed examination of the history of development of the Article. Further, he applied the same rules of construction that this Court has applied when interpreting the Convention.

1. The Master reviewed the origins of Article 10(1), beginning with the Conference for the Codification of International Law at the Hague in 1930. See Report 294-297. As he recounted, the committee preparing for the Conference circulated a questionnaire to solicit views on issues, including the definition of an island. Based on the responses, the committee proposed discussion of a standard that would require permanent elevation above high tide:

BASIS OF DISCUSSION No. 14

In order that an island may have its own territorial waters, it is necessary that it should be permanently above the level of high tide.

Id. at 295.¹⁶ At the Conference, a subcommittee that was assigned the issue produced a definition incorporating a prerequisite of permanence:

ISLANDS

Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark.

Id. at 296.¹⁷ The 1930 Conference took no action on the subcommittee report, and the Conference ultimately

¹⁶ See *Conference for the Codification of International Law, 2 Bases of Discussion: Territorial Waters*, League of Nations Doc. C.74.M.39.1929.V (1929), reprinted in *2 League of Nations Conference for the Codification of International Law [1930]* 54 (ed. Shabtai Rosenne 1975).

¹⁷ See *3 Acts of the Conference for the Codification of International Law, Minutes of the Second Committee: Territorial Waters*, League of Nations Doc. C.351(b).M.145(b).1930.V (1930), reprinted in *4 League of Nations Conference for the Codification of International Law [1930]* 219 (ed. Shabtai Rosenne 1975).

terminated for lack of agreement on the width of the territorial sea. See *id.* at 296-297.

In 1951, the International Law Commission of the United Nations carried on the work of the 1930 Conference. See Report 297-299. Mr. J.P.A. Francois, the special rapporteur, initially proposed the definition of an island suggested by the subcommittee of the 1930 Conference: "an area of land surrounded by water, which is permanently above high-water mark." *Id.* at 297.¹⁸ During the 1954 session, at the recommendation of Sir Hersch Lauterpacht of the United Kingdom, the Commission added the words "in normal circumstances" to allow for "exceptional cases." *Ibid.*¹⁹ The Commission's final report included that one change:

Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.

Id. at 298.²⁰

The United States Department of State prepared an internal memorandum in 1957 evaluating the work of the International Law Commission. See Report 298-299. On

¹⁸ See J.P.A. Francois, *Report on the Regime of the Territorial Sea*, [1952] 2 Y.B. Int'l L. Comm'n 25, 36, U.N. Doc. A/CN.4/53 (in French, translation from Alaska Exh. 84A-21, at 41); J.P.A. Francois, *Second Report on the Regime of the Territorial Sea*, [1953] 2 Y.B. Int'l L. Comm'n 57, 68, U.N. Doc. A/CN.4/61 (in French); J.P.A. Francois, *Third Report on the Regime of the Territorial Sea*, [1954] 2 Y.B. Int'l L. Comm'n 1, 5, U.N. Doc. A/CN.4/77 (in French).

¹⁹ See *Summary Records of the 260th Meeting*, [1954] 1 Y.B. Int'l L. Comm'n 90, 92, 94.

²⁰ *Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. (No. 9) at 16, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 253, 270.

the subject of islands, Mr. Benjamin Read suggested that the words "permanently" and "in normal circumstances" appeared inconsistent and could be omitted:

The Commission's definition is the same as that adopted by the Second Sub-Committee at the 1930 Hague Conference, except that the words "in normal circumstances" were added . . . in order to "cover exceptional cases." The added words seem incompatible with the succeeding word "permanently" in the definition. Both terms might well be omitted, since current international law does not purport to solve such *minor problems* . . . as how to treat land which is above sea level at neap high tides [*i.e.*, twice monthly lowest high tides] but not spring high tide [*i.e.*, twice monthly highest high tides] or only at high tides during certain seasons of the year.

Ibid. (quoting Alaska Exh. 84A-021, at 11) (emphasis added). The memorandum made three significant points: (a) the qualifier "in normal circumstances" was intended to allow for "exceptional cases"; (b) those cases were understood to mean inundation at unusually high states of high tide; and (c) those events were considered to present only "minor problems." Those minor problems are solved today by recognition of a "high water datum." See Report 234-236.²¹

Accordingly, as the Master explained, the United States recommended deletion of the words "permanently" and "in

²¹ The parties agree that, under established practice, "high tide" under Article 10 is construed to mean "mean high water," a datum developed based on 19 years of observations by the National Ocean Service. Report 234-236; see *United States v. California*, 382 U.S. 448, 449-450 (1966) (per curiam) (*California III*).

normal circumstances," at the 1958 United Nations Conference on the Law of the Sea:

The requirements in the International Law Commission's definition of an island that it shall be above the high-water mark "in normal circumstances" and "permanently" are conflicting, and since there is no established state practice regarding the effect of subnormal or abnormal or seasonal tidal action on the status of islands, these terms should be omitted.

Report 299-300.²² The 1958 Conference accepted the United States' proposed changes. *Id.* at 300.²³ The final Convention text is reflected in Article 10(1), which defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high-tide." *Ibid.*

The Master reasoned from the history of the Convention that the "1958 deletion of 'permanently' must be read together with the deletion of 'in normal circumstances.'" Report 301. He determined that the drafters intended to allow for only "temporary inundation," stating:

The two phrases were viewed as conflicting, but in fact any conflict seems to be limited to the case where abnormal circumstances lead to the temporary inundation of a feature that would otherwise qualify as an island.

Ibid. His reconciliation of the two phrases, and his explanation of their deletion, are consistent with the observations of two of the most influential members of the

²² U.N. Conference on the Law of the Sea, 1st Comm., *Summary records of meetings*, 3 Official Records 242, U.N. Doc. A/CONF.13/C.1/L.112 (1958).

²³ U.N. Conference on the Law of the Sea, 1st Comm., 52d mtg., 3 Official Records 160, 161-163 (1958); *id.*, 19th plen. mtg., 2 Official Records 61, 64.

International Law Commission. In 1954, Mr. Spiropoulos and Mr. Francois, the Rapporteur, commented that Mr. Lauterpacht's addition of the phrase "in normal circumstances" was unnecessary because it was implied in the original draft. See Clive Symmons, *The Maritime Zones of Islands in International Law* 42 (1979).²⁴

Thus, the Master construed Article 10(1) to define an island as a feature "generally", "normally," or "usually" above mean high water. Report 302. Contrary to Alaska's argument, the Master did not fashion a new standard (Alaska Except. Br. 6, 44); he interpreted Article 10(1) in light of the drafters' deletions with the express intention of avoiding any new standard:

I do not believe the drafters intended, in eliminating supposedly conflicting standards, to adopt yet another standard less demanding than either of the first two. That the drafters declined to say an island must be "permanently above water at high tide" or "normally above water at high tide" does not mean they intended to insert some weaker qualifier such as "sometimes" or "occasionally."

Report 301.²⁵

²⁴ Sir Gerald Fitzmaurice, the primary British delegate to the 1958 Conference, and later a Judge on the International Court of Justice, commented on the definition immediately after the Conference, stating:

[I]n the absence of any special agreement to the contrary, any natural formation (even a mere rock), permanently (even if only just) visible at all states of the tide, generates a territorial sea.

Gerald Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 Int'l & Comp. L.Q. 73, 85 (1959).

²⁵ The Master noted that "an arguably relevant international case supports a rather demanding standard" of vertical permanence. Report 301. Following the ratification of the Convention, England and

Indeed, Alaska once agreed with that interpretation, for the Master observed when he issued his Report: "Even Alaska contends only that Article 10 permits a feature 'to slump on occasion' below the tidal datum and still to qualify as an island. AB [Alaksa Brief] 64." Report 301. Thus, it is Alaska that now seeks to graft a new standard on the Convention definition. By rejecting "normally," Alaska apparently demands a weaker, more forgiving criterion that ignores both "permanently" and "in normal circumstances." Under Alaska's view, a feature need appear only episodically above mean high tide.

2. The Master's reliance on the history of the development of Article 10(1) is consistent with this Court's method of interpreting the Convention. In the *Louisiana Boundary Case*, the Court examined the International Law Commission's addition to Article 11, which governs the treatment of low-tide elevations for purposes of determining the baseline of the territorial sea. 394 U.S. at 40-47.²⁶ The United States argued that the addition was not intended merely for clarification, but instead to effect a change in Article 11's meaning.²⁷ The Court disagreed,

France disputed whether Eddystone Rock off the coast of Cornwall was an island. See *ibid.* (citing *Delimitation of the Continental Shelf (U.K. v. Fr.)*, 18 R. Int'l Arb. Awards 3, 65-74 (1977)). The Rock was covered only at "high water equinoctial springs." Report 301 (quoting 18 R. Int'l Arb. Awards at 66). Although the case was resolved on the ground that France had already accepted the Rock as a basepoint, the Master observed that "the parties did argue the case as if a formation, to be an island, must be almost never below water." Report 302.

²⁶ The addition specified that low-tide elevations could be used only once to extend a baseline, so that a country could not unduly extend its baselines seaward by leapfrogging from one low-tide elevation to the next. 394 U.S. at 45.

²⁷ The United States argued that the change was intended to preclude extensions of the territorial sea that might otherwise be at-

stating that "any change in the basic meaning of the Article" would have to be apparent in the history of its development. *Id.* at 46. The Court explained:

Precisely the opposite conclusion, however, flows from an inspection of the history of the Convention. The amendment was advanced by the United States; yet its explanation for the proposal contained not the slightest indication that any change in the basic meaning of the Article was intended. *Surely there would have been some discussion of the reference to the territorial sea as a measure of distance rather than as a situs had it been the purpose of the United States or the Conference to alter so significantly the meaning of prior drafts and the existing international consensus.*

Ibid. (emphasis added, footnote omitted).²⁸ The Master applied similar reasoning here. He examined the two deletions in Article 10(1) and looked for any sign of departure from the basic meaning of prior drafts. He found no such sign. Compare *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 186-187 (1993).

3. Alaska cites numerous sources (Alaska Except. Br. 45-51) to support its contention that Article 10(1)'s definition of an island encompasses "ephemeral" features. Those sources are of little value because they are either

tempted by extending baselines from bay and river closings seaward to low-tide elevations. 394 U.S. at 41-43.

²⁸ Sometimes no significance at all should be attributed to the choices of drafters, because they may have been simply searching for the best way to describe a concept. See, e.g., 394 U.S. at 45 n.58; see also 2A Norman Singer, *Sutherland's Statutory Construction* § 48.18, at 369 (5th ed. 1992) ("An amendment may have been adopted, only because it better expressed a provision already embodied in the original bill or because the provision in the original bill was unnecessary as unwritten law would produce the same result without it.").

inconclusive or they predate the Convention and suffer from the weight of countervailing authorities. Alaska places particular reliance on its claim that Dinkum Sands is "far more stable" than mudlumps at the mouth of the Mississippi River, which Alaska contends are islands. Alaska Except. Br. 45-46, 51. The Master appropriately discounted the mudlumps as a precedent for Dinkum Sands because of the absence of evidence concerning their behavior. See Report 291-293 & n.49. Alaska put forward no evidence that the mudlumps behave like Dinkum Sands, which lacks vertical permanence and can rise above and fall below mean high water over the span of days, weeks, or months. As the Master stated, "[t]he record contains no evidence * * * of the behavior of these features in general." *Id.* at 293 n.49.

Alaska contends that the mudlumps are "temporary" features based on *The Anna*, 165 Eng. Rep. 809 (1805). The English court in that case found that a British privateer had illegally captured an American cargo ship inside United States territory because of the proximity of the capture to the mudlumps. The parties disagreed on the consistency of the mudlumps for purposes of defining United States territory. The captive described them as "small islands, which are always dry," while the captor described them as "temporary deposits of logs and drift." *Id.* at 810, 811. As the Master pointed out, the English court did not address "whether the islands were permanent." Report 291.²⁹

²⁹ Furthermore, the English court's 1805 decision in *The Anna* is of no value in interpreting Article 10(1) of the 1958 Convention. Indeed, that case did not discuss the legal definition of an island. Instead, the court described the mudlumps as forming "a kind of portico to the mainland," identified the issue as whether they are "to be deemed the shore," and ruled that "they are the natural appendages of the coast on which they border, and from which indeed they are formed." 165 Eng.

Alaska cites other 19th century sources for the propositions that features should be deemed islands even if inundated for 40 years and that the period of submergence is irrelevant as long as it is not permanent. Alaska Except. Br. 48-49. Those references are not helpful in construing Article 10(1). Indeed, the State appears to be attempting to turn upside down the notion of permanence above high water from which Article 10(1) was developed.³⁰ Alaska similarly cites a series of mostly early cases relying on the same sources and state laws to address questions of shore erosion and submerged islands in river channels and along beaches. *Id.* at 49. Application of those authorities, relying on common law principles based on

Rep. at 815. See Report 291-292. This Court discussed *The Anna* in the *Louisiana Boundary Case* when it considered the question whether islands can be headlands for the purpose of closing bays under Article 7(4). It expressed no view, however, on whether the mudlumps were islands for purposes of Article 10(1). See 394 U.S. at 60 n.80, 64 n.84. Special Master Armstrong later noted the existence of mudlumps in determining the Louisiana coastline and the closing lines for particular bays, but he likewise did not determine whether they were in fact islands within the meaning of Article 10(1). See Report of Special Master Walter P. Armstrong, Jr., at 38-40, 42, 43-44 (1974), *United States v. Louisiana* (No. 9, Orig.) (reproduced in *Submerged Lands Cases* 224-226, 228, 229-230); *United States v. Louisiana (Louisiana Boundary Case)*, 420 U.S. 529 (1975) (accepting Report).

³⁰ The references are at odds with early countervailing authorities emphasizing a need for permanence above high tide. See U.S. Exh. 84A-602, at 12 (1923 Report of the Territorial Waters at the Imperial Conference, defining islands as "all portions of territory permanently above high water in normal circumstances and capable of use and habitation"); *id.* at 20 (translated excerpt from 3 Gilbert Gidel, *Le Droit International de la Mer* 684 (1934), describing an island as "a natural elevation of the waterbottom which, is surrounded by water, is, in a permanent way, above high tide and the natural conditions of which permit the stable residence of organized human groups"). See also Tr. 1106, 1108, 1161.

accretion and avulsion, sheds no light on the meaning of Article 10(1) of the Convention.

In short, Alaska's objection to the Master's construction of Article 10(1) should be rejected. The Master's interpretation is rooted in his examination of the language of Article 10(1) and the history of its development. His method of examination is the same as that the Court employed in interpreting Article 11 of the Convention, and his conclusion is reasonable.

B. The Master Correctly Found That The Evidence Showed Dinkum Sands To Be Frequently Below Mean High Water

Alaska concedes that Dinkum Sands is "sometimes submerged," but nevertheless argues that it has the appearance of an island. Alaska Excerpt. Br. 51. That argument is founded on a 1949-1950 United States survey, which measured Dinkum Sands as above mean high tide. The other sources to which Alaska points (charts, Baseline Committee designations, and leasing maps) all rely on the 1949-1950 survey rather than independent observations.

The countervailing evidence before and after that survey is extensive. Early cartography, including the work of respected explorer and geologist Ernest de K. Leffingwell, repeatedly shows only a low-tide elevation in the area of Dinkum Sands. Observers saw no island at that location during a 1947 photographic survey. Searches for Dinkum Sands by ship in 1955 and by helicopter in 1976 concluded that it was "not there." Later visits likewise usually found it under water. Furthermore, Alaska ignores the parties' 1981 joint monitoring project, during which the feature was surveyed in March, June, and August and found to be below mean high water. In short, the totality of the evidence shows that Dinkum Sands is usually below water, and in any event it fails to establish

that Dinkum Sands is normally *above* mean high tide, as Article 10(1) requires. It therefore is not an island under Article 10(1).

1. The Special Master reviewed voluminous cartographic evidence put forward by the parties. See Report 240-242. Maps from the 19th century, if they marked any feature at all, showed only a shoal in the area of Dinkum Sands. *Id.* at 240. In the early 20th century, Ernest de K. Leffingwell, a geologist and explorer, conducted the first detailed mapping of the Alaska north coast, making ten trips by ship and 31 trips by small boat and sled. Ernest de K. Leffingwell, *The Canning River Region, Northern Alaska* (U.S. Geological Paper 109) (1919) (U.S. Exh. 84A-135). Historical geographer Dr. De Vorse testified that Leffingwell had an incentive to locate a feature between Cross and Narwhal Islands to facilitate his surveying. Report 241. However, Leffingwell's map of the Dinkum Sands area shows only a shoal submerged beneath a minimum depth of 2.25 fathoms (13.5 feet). *Ibid.* Leffingwell's report served as a basis for United States Coast and Geodetic Survey charts, which, through 1950, marked Dinkum Sands at that depth. *Id.* at 241-242.

In 1947, the Coast and Geodetic Survey began preparations for the 1949-1950 hydrographic survey. The preparations included flights to photograph "the beach and all * * * islands." U.S. Exh. 84A-227, at 2-3. A participant in that survey, Harley Nygren (who was an ensign at the time of the survey and a retired admiral at the time of this trial), acknowledged that the photographs showed no evidence of Dinkum Sands. Tr. 1336, 1356-1357; see also Hydrographic Descriptive Report H-7761, U.S. Exh. 84A-225. In view of the cartography and photography, it is no wonder that the members of the survey group, including local natives, were surprised when they discovered "a new gravel bar baring about three feet." Report 231 (quoting

U.S. Exh. 84A-225, at 3). See Tr. 1361, 1378. As Nygren later testified, "[w]e had no indication whatsoever that there was any such body in the area." Tr. 1325-1326. The group erected a survey target and photographed the feature. Based on the survey of 1949-1950, the Coast and Geodetic Survey charts showed Dinkum Sands as an island until 1955. Report 231-232, 242.

2. In 1955, the Navy vessel U.S.S. *Merrick* conducted an Arctic resupply operation. Report 232, 242-243. As part of its mission, the *Merrick* was inspecting aids to navigation, both artificial and natural. Tr. 517. After attempting to find Dinkum Sands, the commanding officer reported "Survey Target and island not there." U.S. Exh. 84A-241, at 9. Alaska dismisses the report as "cryptic," Alaska Except. Br. 52, but that label ignores the full import of the observation. The *Merrick* report explained that comments were made about aids "only when the aid was definitely sighted or definitely absent. When visibility or the distance of the ship from shore prevented certain knowledge of the conditions of the aid, no comment was made." Report 242-243. While in the area, the *Merrick* also dispatched two small boats to assist the grounded U.S.S. *Archer T. Gammon*. The boats came within two miles of the location of Dinkum Sands when visibility was reported as seven miles with no waves. *Id.* at 243; Tr. 1699-1700.

Based on the 1955 *Merrick* report, the Coast and Geodetic Survey resumed charting Dinkum Sands as a low-tide elevation beginning with its 1956 edition. Report 232, 243. That designation reflected a standard practice that was intended to warn mariners of possible navigation hazards. *Ibid.*; Tr. 637, 641. In 1976, the Coast Guard and the National Ocean Survey (NOS), successor to the Coast and Geodetic Survey, conducted a project to "investigate all charted landmarks' along the Alaskan Arctic coast." Report 243 (quoting U.S. Exh. 84A-246, at 4). The agen-

cies conducted the survey by helicopter at 300 feet, and NOS commander Ned Austin reported on Dinkum Sands: "Couldn't find island," "Island Not There—Survey Target Destroyed." *Ibid.*; see U.S. Exh. 84A-246, at 19. Based on the 1955 *Merrick* report and Commander Austin's 1976 report, NOS continued to chart Dinkum Sands, for purposes of navigation safety, as a low-tide elevation. Report 243.

Alaska makes much of 1971 baseline charts and a 1979 leasing map that treated Dinkum Sands as an island, even though it was treated by the charting agency as a low-tide elevation. Alaska Except. Br. 43-44, 53. The Master appropriately considered neither of them to be of significance, because they both stemmed from the 1949-1950 survey alone and were contrary to later observations. Report 232-233, 244. Indeed, the discrepancy is easily explained. As noted above, Harley Nygren was an ensign in the survey group that had personally observed Dinkum Sands during the 1949-1950 survey. Twenty years later, in 1970, Nygren was an admiral and a member of the inter-agency Baseline Committee, which was charged with delimiting the United States' coastline and territorial sea. Based on his personal experience, Nygren persuaded the Committee that Dinkum Sands was an island, even though the current charts showed it to be a low-tide elevation. See Tr. 1639-1672. In the proceedings before the Master, Nygren acknowledged that he did not examine, either before or after the Committee meeting, the reason why the official charting agency had changed Dinkum Sands to a low-tide elevation. Tr. 1373-1374. The 1979 leasing map was merely another generation of the Nygren-influenced Baseline Committee charts. Report 232-233, 244.

3. Alaska's brief makes no mention of the joint monitoring project that the parties developed in the course of the litigation to measure the elevation of Dinkum Sands

in relation to mean high water. That jointly funded, \$2.8 million project was conducted under a consensual protocol worked out in advance of the actual measurements. Report 233, 248; U.S. Exhs. 84A-302, 84A-400. Under the project, the feature was measured in March, June, and August 1981, and each time it was found to be below mean high water. Report 248. Alaska challenged those results, but the Master rejected Alaska's objections.

The joint project was conducted in two parts. First, the parties contracted with NOS to compute a mean high water datum for Dinkum Sands. As agreed, NOS trained an independent contractor to collect the data, monitored the collection process for accuracy, and then computed the datum using standard NOS procedures. U.S. Exh. 84A-400, at 1; Tr. 758, 788, 839. NOS made the computation based on a year of tidal data from nearby Cross Island and three months from Dinkum Sands. Ordinarily, 19 years of continuous readings would be used, but readings of that duration are not available in desolate Arctic regions. Therefore, as agreed, NOS calculated an error band. U.S. Exh. 84A-403. It showed that there was a 95% chance that the tidal datum was accurate within plus or minus .206 feet (2.47 inches) of the value that would have been calculated using 19 years of readings. Report 249-252.

Second, the parties contracted with an engineering firm to measure, under the parties' oversight, the height of Dinkum Sands. U.S. Exh. 84A-302. Elevations of the high points of the formation were measured three times in 1981. In March, the top of the formation was determined by augering through the ice cover until gravel was encountered. In June, when the ice pack had begun to break up, the top was determined by selecting the high points of gravel that appeared above the ice. In August, during open water, the surveyors measured the apparent

high point of the feature, which was submerged. Report 253-255.

After the measurements were made, Alaska prepared the final report tying the two parts together. U.S. Exh. 84A-302. As had been agreed, the final report superimposes the separately determined mean high water datum over the elevation measurements. Not until that time did the parties know the results of the joint project. The results showed Dinkum Sands to have been .28 feet below mean high water in March; .02, .04 and .28 feet below mean high water from the three highest points in June; and 2.27 feet below mean high water in August. The March measurement is the only ice-locked, winter measurement ever made of Dinkum Sands. While the two highest points in the June survey were within the error band, the Master found them to be of "little or no weight" because, as the testimony showed, the gravel high points likely were piles left from the augering during the March survey. Report 253-255.

The Master found Alaska's objections to the joint project to be unpersuasive. Report 255-269. Alaska argued that the mean high water datum should be lowered by a total of .26 feet by making two adjustments. As the Master observed, the adjustments would still place all measured elevations, exclusive of the two dubious June measurements, below mean high water. *Id.* at 257. However, because the March and other June measurements would be in the error band, he examined the two adjustments. *Ibid.*

The Master rejected Alaska's argument to lower the datum by .20 feet to account for alleged long-term tidal trends, relying primarily on "the evidence that the trend may vary locally not only in magnitude but in direction, and in view of the lack of evidence of trend specific to Dinkum Sands." Report 262. He found it unnecessary to rule on Alaska's second downward adjustment of .06 feet to

account for barometric pressure effects on sea level, because it would not place Dinkum Sands above mean high water at any of the times it was surveyed. *Id.* at 264. He also noted his doubts about the reliability of the barometric pressure data and the appropriateness of singling out only one of several sea-level influences. *Ibid.*³¹

The Master also dismissed Alaska's argument for a wider error band. He found that the State's argument had "not been fully spelled out" and that, in any event, it was not necessary to resolve because "[t]he controlling point is the estimate of mean high water," whatever the width of the error band. Report 268-269. Furthermore, while Alaska questioned the degree of possible variance from a datum based on 19 years of tidal data, the figure computed from one year of data is "the best estimate now available." *Id.* at 269. By agreeing to the one-year joint project, the parties "consciously gave up some precision of result for the sake of reasonable time and expense." *Id.* at 269 n.34.³²

4. The Master also considered numerous observations of Dinkum Sands in years before and after the 1981 joint monitoring project. From 1970 to 1978, Dr. Reimnitz, the United States' expert geologist, observed Dinkum Sands below water on all of several visits except one. Report 245-246. In 1979, he observed Dinkum Sands both above and

³¹ It is also significant that NOS computed the mean high water datum according to standard NOS procedures, as the parties had agreed before embarking on the joint project, and that Alaska has subsequently relied on it for mapping. Tr. 758, 788, 839, 1758.

³² In fact, the error band is very close to the estimate provided to the parties before the joint project, and the official responsible for calculating the error band did not know the estimate before completing his work. Tr. 876-877. Although Alaska argued for those adjustments, its primary source of evidence—the 1949-1950 survey—did not have the benefit of an error band, nor were there trend and weather adjustments. Tr. 1367.

below water. On July 25, 1979, Dr. Reimnitz photographed Dinkum Sands as it usually appears during the open water season—submerged. See Fig. 1, *infra*, U.S. Exh. 84A-507a. Based on the closest data source, a tide gauge approximately 15 miles away, he calculated the feature to be .33 to .66 feet below mean high water. Report 247. In 1980, sightings ranged from one foot above water to a meter below. *Id.* at 248. On July 31 and August 1, 1981, the Master, counsel, Dr. Reimnitz, and others visited the feature and found it submerged. *Id.* at 228, 247-248.³³

After the joint survey, the feature was again observed above and below water. On July 7, 1982, an Alaska witness visited Dinkum Sands. By using Cross Island tidal data and a 1981 joint project benchmark, apparently without releveling it, he calculated the feature to be above mean high water. Report 278. On September 19 and 29, 1982, Dr. Reimnitz observed the feature below water. The Master estimated that on those visits it was below mean high water, using Alaska's evidence on seasonal sea levels and other assumptions favoring Alaska. *Id.* at 280-282.

During five visits by state witnesses from May through July in 1983, Dinkum Sands was measured above mean high water. See Report 278-280. The Special Master gave special weight to the June 22 visit, because NOS had assisted the State witnesses by recommending releveling of the Cross Island benchmarks and collecting tidal data at both Dinkum Sands and Cross Island. *Id.* at 278-279. Alaska's witness also made observations in late 1983. He

³³ Alaska derisively refers to Dr. Reimnitz as "an Interior Department staffer" who "erroneously claimed that the 1949 survey was off by three feet." Alaska Except. Br. 53. Reimnitz was not a mere "staffer," but was a preeminent expert on the Arctic coastal region who had extensively studied Dinkum Sands during field work between 1970 and 1980. Tr. 909-919. The Master found his work highly credible and properly relied on his observations. See Report 244-248.

estimated that Dinkum Sands was above mean high water on August 26 and below mean high water on September 11. Dinkum Sands was submerged on October 12, but ice movement had destroyed the tidal measuring rod and prevented a tidal observation. *Id.* at 282-283.

The Master summarized the evidence on Dinkum Sands and placed primary emphasis on actual observations from 1981 through 1983. Report 307-310. He concluded:

The preponderance of the evidence is that, in one year of the three (1981), Dinkum Sands was consistently below mean high water and, in two years of the three (1981 and 1982), it was below mean high water by the end of the open-water season.

Id. at 308-309. He also explained that the evidence showed Dinkum Sands to exhibit a regular pattern of slumping as the summer progresses, and thus that it may have been below mean high water in 1979 and 1980 as well. *Id.* at 309 n.66. Indeed, the evidence suggests the same for late 1983. *Id.* at 282-283, 288.³⁴ On the basis of all the evidence, the Master found "that Dinkum Sands is frequently below mean high water and therefore does not meet the standard for an island." *Id.* at 309. That recommendation is sound and should be accepted by this Court.

C. The Master Properly Determined That Dinkum Sands Should Not Be Treated As Alternating Between An Island And A Non-Island Formation

Alaska has watched its position on the status of Dinkum Sands erode over the course of the proceedings. See Report 307 (noting that Alaska originally argued that

³⁴ The explanation for slumping is that ice in the upper part of Dinkum Sands melts during the summer, causing "ice collapse" and reducing the feature's elevation by approximately 50 centimeters (1.6 feet). Report 270, 281-282.

Dinkum Sands is "always above high water"). In response, Alaska now favors a compromise resolution under which Dinkum Sands would be deemed an island when above mean high water but not when it is below mean high water. The parties identified the alternative in the Joint Statement and closing arguments, but did not brief the question. *Id.* at 305. The Master has appropriately recommended against that approach. *Id.* at 305-307.

As the Master explained, neither party has identified a precedent for treating as an island a feature that oscillates above and below mean high tide. United States expert Clive Symmons explained that "occasional islands" are not legally recognized, stating that

in international law, there is no such phenomenon as a "seasonal" or "occasional" island merely on the basis of periodic appearances above mean high-tide.

U.S. Exh. 84A-602, at 67. Moreover, a notion of temporary islands would pose the problem of sovereign enclaves, with their own territorial seas, constantly appearing and disappearing at the whim of nature. That unpredictability would frustrate the policy of freedom of the seas and place mariners at risk of inadvertent breaches of sovereignty. *Id.* at 59; see also Report 304.

Furthermore, there is no compulsion under United States law to accept a theory of temporary islands. As the Master explained, "Article 10 does not demand an interpretation under which islands may frequently come and go." Report 305. Alaska suggests (Alaska Except. Br. 55-56) that this Court has found itself bound by the Submerged Lands Act to recognize ambulatory boundaries. See *Louisiana Boundary Case*, 394 U.S. at 32-34. But since that time, Congress has recognized the value of fixing the federal-state coastal boundary to provide greater certainty respecting ownership rights, and it has

expressly granted the Court the power to take that step. See Outer Continental Shelf Lands Act Amendments of 1985, Pub. L. No. 99-272, Tit. VIII, § 8005, 100 Stat. 151 (1986) (amending the Submerged Lands Act, 43 U.S.C. 1301(b), to provide that a boundary between the United States and a State may be fixed by a Supreme Court Decree). See Report 306 n.64.

Moreover, what Alaska proposes is not the typical "ambulatory" boundary that moves in a particular direction through a gradual process of accretion or erosion, but rather a boundary that would oscillate suddenly and unpredictably between two distinct locations, depending on whether Dinkum Sands happened to be above or below water. That is a novel and unhelpful concept of a "boundary," and not one that this Court should establish to govern future relations between sovereigns.

Finally, as the Master pointed out, a theory of temporary islands would likely lead to costly and time-consuming monitoring efforts and continuing disputes over the scientific methodology and results. Report 305. This case provides a lesson in the difficulty and expense of monitoring a capricious coastal feature in an inclement Arctic region. Even after the parties agreed to a joint monitoring protocol and spent \$ 2.8 million for one year of data, they continued to dispute the accuracy and significance of the results. See *id.* at 248-269. Furthermore, it is not possible to collect evidence now on the vagaries of Dinkum Sands for lease revenues received many years ago.

In sum, the Master properly concluded that "Dinkum Sands should be treated as a single, continuing feature, whose legal status will change only on the basis of a sustained change in its characteristics." Report 307. He properly interpreted the definition of an island under Article 10(1), including the history of the drafters' dele-

tion of the terms "permanently" and "in normal circumstances," to mean a naturally formed area of land "generally," "normally" or "usually" surrounded by water at mean high water. *Id.* at 309. He likewise correctly found from the vast array of cartographic, monitoring, visual, and other evidence that "Dinkum Sands is not an island constituting part of Alaska's coastline for purposes of delimiting Alaska's offshore submerged lands." *Id.* at 310. The Court should accept that recommendation.

III. THE UNITED STATES HAS RETAINED TITLE TO SUBMERGED LANDS WITHIN THE NATIONAL PETROLEUM RESERVE IN ALASKA

Alaska excepts to the Special Master's determination that, when Alaska was admitted to the Union, the United States retained the coastal submerged lands within the National Petroleum Reserve in Alaska. See Report 343-446; U.S. Except. Br. 14-21 (summarizing Report). Alaska contends, first, that Congress did not clearly intend to retain ownership of those lands (Alaska Except. Br. 58-62), and second, that retention of those lands through the Alaska Statehood Act would violate the Equal Footing Doctrine (*id.* at 66-71).

Alaska's exception reflects a complete reversal of the position that Alaska took in the initial stages of this litigation. In the original Joint Statement of Questions Presented, the parties had agreed as follows:

The only question before this Court is the location of the seaward boundary of the Reserve, which concededly includes some submerged lands. It is agreed that whatever submerged lands are within the Reservation do not belong to Alaska, having been effectively withheld from the grant to the State at the time of its

admission to the Union under both the *Pollard* doctrine and the Submerged Lands Act.

Report 346 (quoting Joint Statement 17). The Master relieved Alaska of its concession, but he rejected Alaska's arguments on the merits. Report 381-445.³⁵

A. The United States Owns Submerged Lands Within The Boundaries Of The National Petroleum Reserve Because It "Expressly Retained" Those Lands

The Special Master's Report and our opening brief set out the basic legal principles that govern the ownership of coastal submerged lands. Report 15-18, 381-404, 455-457; U.S. Except. Br. 5-7, 31-37. Alaska appears to dispute those principles. In particular, Alaska does not acknowledge this Court's decisions in past submerged lands cases, which draw a fundamental distinction between land beneath territorial sea and land beneath inland waters. We accordingly review those rulings, which provide the foundation for the Master's recommendations in this case.³⁶

³⁵ Alaska does not except to the Master's recommendations concerning the location of the boundary of the National Petroleum Reserve, which was the only question originally at issue. Report 380-381; see *id.* at 349-380 (discussion); *id.* at 348, Figs. 8.1-8.3 (maps).

³⁶ The Master correctly concluded that the principles that we articulate here apply equally to the United States' claim to submerged lands within the Arctic National Wildlife Refuge. See Report 456-457. The Master rejected our claim to those lands, however, based on an additional consideration. He concluded that the United States had not expressly retained those lands under Section 6(e) of the Alaska Statehood Act, even though the United States had "set apart" those lands for a wildlife refuge, because the United States had not completed the formal process for establishing the refuge at the time of Alaska's admission to the Union. We have excepted from that recommendation. See U.S. Except. Br. 31-53.

1. This Court has consistently recognized that the United States holds title under the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, to submerged lands in pre-statehood territories. The United States has complete and paramount constitutional power over all lands seaward of the coastline (the line of ordinary low tide), which includes the area known as the territorial sea. See, e.g., *United States v. California*, 332 U.S. 19 (1947) (*California I*). However, in a territory, the United States holds title to inland navigable waters, including tidelands (*viz.*, the area between ordinary low and high tides), in trust for future States. See, e.g., *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

The constitutional distinction between the territorial sea and inland waters arises from both history and principles of federalism. The Court recognized that the original thirteen States possessed title to lands beneath inland navigable waters, see *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842), and it concluded that new States, which are admitted on an "equal footing" with the original States, are likewise entitled to those lands. *Pollard's Lessee*, 44 U.S. (3 How.) at 228-229. But the original thirteen States had no rightful claim to lands beneath the territorial sea, and accordingly newly admitted States had no "equal footing" claim to those lands. *California I*, 332 U.S. at 30-33. Moreover, the Court was "not persuaded to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern." *Id.* at 36. The Court emphasized that the "rationale of the *Pollard* case" actually supports "the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt." *Ibid.* See U.S. Except. Br. 31-33.

2. Congress has applied those constitutional principles in the Submerged Lands Act, which "embraced" the Court's holding that "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty." *United States v. Maine*, 420 U.S. 515, 524 (1975). As a general matter, Section 3(a) of the Act confirms the States' rights under the Equal Footing Doctrine to submerged lands beneath inland waters. It also grants the States title to submerged lands beneath a three-mile belt of the territorial sea. 43 U.S.C. 1311(a). The Act, however, includes important exceptions. Of particular relevance here, Section 5(a) of the Submerged Lands Act withholds from the States "all lands expressly retained by or ceded to the United States when the State entered the Union." 43 U.S.C. 1313(a). See U.S. Except. Br. 34-36.

The Submerged Lands Act expresses Congress's understanding that the United States may retain submerged lands and thereby prevent them from passing to a new State upon its admission to the Union. That understanding is consistent with this Court's decisions, which hold that the United States has paramount power over lands beneath the territorial sea, *California I*, *supra*, and which suggest (without deciding) that the United States may reserve for appropriate public purposes lands beneath inland waters, see *Utah Div. of State Lands v. United States*, 482 U.S. 193, 200-202 (1987). In either instance, the basic statutory question is the same: Has the United States "expressly retained" the lands at issue? But as the Special Master recognized, the courts apply different rules of construction in determining the effect of a federal withdrawal, depending on whether the lands are located beneath territorial sea or inland waters. See Report 390-394.

This Court's decision in *California I* squarely holds that the United States has paramount constitutional

power over lands beneath the territorial sea and that the States have no rights under the Equal Footing Doctrine to those lands. See 332 U.S. at 30-36; accord *Maine*, 420 U.S. at 520-522; *United States v. Texas*, 339 U.S. 707, 719 (1950); *United States v. Louisiana*, 339 U.S. 699, 704 (1950). The United States therefore has plenary power and authority to retain or divest those lands as it sees fit. Its determinations whether to retain or divest those lands are judged according to the Court's established rule of decision that the "federal grants are to be construed strictly in favor of the United States." *E.g.*, *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 287 (1982). The Submerged Lands Act's grant of lands beneath the territorial sea is an "exercise of Congress's power to dispose of federal property," *id.* at 285, and, accordingly, if there are doubts whether the United States has retained submerged lands beneath the territorial sea, "they are resolved for the Government, not against it." *E.g.*, *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983). See Report 393-394; U.S. Except. Br. 33-34, 36, 47-48.

The Court has not definitively declared that the United States may retain submerged lands beneath inland waters, but its decisions strongly suggest—and Alaska does not contest (see Alaska Except. Br. 56-58)—that the United States may do so for an appropriate public purpose. See *Utah*, 482 U.S. at 200-202. The Court has recognized that Congress had the power to make pre-statehood conveyances of submerged lands, *Shively v. Bowlby*, 152 U.S. 1, 48 (1894), and it stated in *Utah* that "arguably there is nothing in the Constitution to prevent the Federal Government from defeating a State's title to land under navigable waters by its own reservation for a particular use," *Utah*, 482 U.S. at 201. Indeed, as Justice White noted, one should "more readily find a reservation constitutionally permissible than a conveyance," because reserved sub-

merged lands "retain their sovereign status," and "if Congress later determines that the lands are no longer needed by the Federal Government for a public purpose, it can at that time transfer title to the State." *Id.* at 210 (White, J., dissenting on other grounds).³⁷

The Property Clause of the Constitution provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Art. IV, § 3, Cl. 2. As this Court pointed out in *Utah*, "[t]he Property Clause grants Congress plenary power to regulate and dispose of land within the Territories." 482 U.S. at 201; see also *Alabama v. Texas*, 347 U.S. 272, 273 (1954) ("The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.'") (quoting *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840)). And as the Court further pointed out in *Utah*, "assuredly Congress also has the power to acquire land in aid of other powers conferred on it by the Constitution." 482 U.S. at 201; *Kohl v. United States*, 91 U.S. 367 (1876); U.S. Const. Art. I, § 8, Cl. 18 (Necessary and Proper Clause). Congress accordingly can acquire oil-bearing lands for purposes of securing an oil supply in aid of its power "[t]o provide and maintain a Navy," Art. I, § 8, Cl. 13, and its other powers to "provide for the common Defence," U.S. Const. Preamble; Art. I, § 8, Cls. 1, 11-17. It necessarily follows that Congress may provide for the "disposition" of property belonging to the United States in a Territory—including submerged lands

³⁷ The Court did not resolve that question in *Utah* because it concluded that the United States had failed in any event to demonstrate adequately an intent to retain the submerged lands and defeat the State's title. See 482 U.S. at 209. Four Justices concluded, however, that the United States could retain submerged lands, see *id.* at 209-210 (White, J., dissenting), and had done so in that case, *id.* at 210-219.

that would otherwise be held in trust for a future State—through the reservation of the property for use by the United States Government.³⁸

The Master carefully analyzed the rulings of this Court and other courts bearing on the question, Report 395-404, and he concluded that "a federal reservation or withdrawal of lands beneath inland waters is constitutionally permissible under the equal footing doctrine to the same extent as is a federal conveyance," *id.* at 404. But the Master also recognized that, under the rules that the Court established in *Utah* for construing federal reservations and withdrawals, it is not enough for the United States merely to show that the reservation or withdrawal includes lands beneath inland waters. In light of Congress's established policy to retain those lands for future States, the United States must additionally establish an intent "to defeat the future State's title to such land." 482 U.S. at 202.

Against this background, the Master accordingly concluded that the Court's decisions in *California I* and *Utah* mandate the use of different rules of construction, depending on whether the land lies beneath territorial sea or inland waters, in determining whether the United States has "expressly retained" coastal submerged lands for purposes of the Submerged Lands Act. Report 394. Much of the submerged land at issue in the National Petroleum Reserve lies beneath the territorial sea. The Master nevertheless conducted his analysis under the more stringent "inland waters principles," concluding

³⁸ Even after a State is admitted to the Union, the United States may acquire property of the State, either by purchase or by the exercise of the power of eminent domain. See *Block v. North Dakota*, 461 U.S. 273, 291 (1983); see also *United States v. 50 Acres of Land*, 469 U.S. 24, 31 & n.15 (1984).

that, if the United States established its rights under those principles, it would "certainly meet the less demanding standard" for lands beneath the territorial sea. *Ibid.*

3. As we explain below, the Master correctly concluded that the United States has satisfied the more stringent "inland waters principles" for all submerged lands within the National Petroleum Reserve, and he therefore did not need to conduct a separate evaluation for lands beneath the territorial sea. See Report 394, 445. The relevance of the "less demanding standard" for lands beneath the territorial sea should be kept in mind, however, when analyzing Alaska's exception. Alaska objects to the Master's recommendation based on its understanding of the Equal Footing Doctrine. But as this Court's decision in *California I* holds, that doctrine applies only to land beneath inland navigable waters. 332 U.S. at 31-36.³⁰

Alaska's exception accordingly is inapposite to the lands beneath the territorial sea, where the United States' rights are paramount. The United States unambiguously reserved those submerged lands—and thereby "expressly retained" them for purposes of Section 5(a) of the Submerged Lands Act—by including them within the seaward boundary of the National Petroleum Reserve. There is no need to look further than the specification of that boundary to resolve the ownership of the disputed lands beneath the territorial sea. See Report 344-346; *id.* at 348, Figs. 8.1-8.3. The only lands that are truly at issue under

³⁰ Alaska suggests that the Submerged Lands Act requires this Court to apply the Equal Footing Doctrine to the territorial sea. Alaska Exempt. Br. 57 n.34. As the Master noted, this Court has rejected that argument. Report 392-394 (quoting, *e.g.*, *Maine*, 420 U.S. at 524); see, *e.g.*, *California ex rel. State Lands Comm'n*, 457 U.S. at 285-287; *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-374 & n.4 (1977).

Alaska's exception are tidelands and other lands beneath coastal inland waters, which comprise only a portion of the coastal submerged lands that Alaska has claimed in the National Petroleum Reserve. See *id.* at 394. With that understanding, we turn to Alaska's specific objections.

B. Contrary To Alaska's Assertions, Congress Intended To Reserve The Submerged Lands And Defeat Alaska's Claim To Title

Alaska raises three objections to the Master's determination that the United States retained title to the submerged lands within the National Petroleum Reserve. Alaska contends that: (1) the Pickett Act did not authorize the federal reservation of submerged lands (Alaska Exempt. Br. 58-60); (2) there was no "public exigency" justifying inclusion of submerged lands (*id.* at 61-62); and (3) there is no "affirmative evidence" that Congress intended to defeat Alaska's title (*id.* at 62-66). Those objections are without merit.

1. The United States created the National Petroleum Reserve in Alaska through Executive Order No. 3797-A (1923). See Report 343-345 & n.1. That order described the boundary line of the Reserve (which was then known as Naval Petroleum Reserve No. 4) as following the Arctic Ocean's coastline along "the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore." *Id.* at 345. Accordingly, as Alaska had originally conceded, that order explicitly withdrew and reserved lands beneath offshore navigable waters within the specified boundaries. See *id.* at 345-346. Alaska now argues, however, that the President lacked authority to include submerged lands within the Reserve. As the Special Master correctly concluded, the Act of June 25, 1910, ch. 421, 36 Stat. 847, which is known

as the Pickett Act, authorized that withdrawal. See Report 404-416.⁴⁰

Alaska is mistaken at the outset in its assertion that the Alaska Right-of-Way Act of May 14, 1898, ch. 299, 30 Stat. 409, precluded the President from withdrawing submerged lands. That Act, which is set out in the Master's Report at page 411, authorized railroads to construct facilities "for connection with water transportation," but provided that "nothing in this Act" shall impair a future State's title to tidelands and beds of navigable rivers, which "shall continue to be held by the United States in trust" for the people of any State or States that might thereafter be erected in the District of Alaska. § 2, 30 Stat. 409. The Right-of-Way Act does not have the force that Alaska ascribes to it. As the Master noted, the Alaska Right-of-Way Act could not limit the scope of the Pickett Act, because "an earlier Congress cannot bind a later one." Report 411. Furthermore, there is no conflict between the Pickett Act and the Right-of-Way Act.⁴¹

⁴⁰ The Pickett Act, which has since been repealed, stated in relevant part:

That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

§ 1, 36 Stat. 847, repealed by the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2792.

⁴¹ The Alaska Right-of-Way Act recognized the existence of the Equal Footing Doctrine and prevented that Act from conveying land beneath inland waters to the railroads. But as noted above, the Equal Footing Doctrine embraces the principle that the United States may convey or reserve submerged lands for appropriate public purposes.

Alaska also argues (Alaska Except. Br. 59) that the Pickett Act did not grant the President authority to withdraw lands beneath navigable waters because it allowed him to withdraw "public lands," which—according to Alaska—necessarily excludes submerged lands. The Master carefully considered and rejected that argument. See Report 407-414. As he pointed out, this Court, in the specific context of Alaska, has "reject[ed] the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987) (citing *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 115-116 (1949)). See Report 409.⁴²

Hence, Congress's mere recognition of the Equal Footing Doctrine in the Right-of-Way Act did not conflict with the Pickett Act's grant of authority to reserve those lands. Furthermore, there is nothing inconsistent in Congress's decision to withhold submerged lands from private railroad companies, but later to allow the *federal government* to withdraw such lands for appropriate *public* purposes. See also Report 414-416 (reconciling the Pickett Act with the Alaska Right-of-Way Act); cf. *Wisconsin v. Baker*, 698 F.2d 1323, 1334 (7th Cir.) (recognizing that "the people * * * have a compelling interest in seeing that powers reposed in their government are not surrendered to private, non-representative groups"), cert. denied, 463 U.S. 1207 (1983).

⁴² Alaska derives its definition of "public lands" (Alaska Except. Br. 59 & n.36) from statements, taken out of context, in two cases involving private land disputes. See *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 17 (1935); *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894). Those cases recognize the familiar rule that, when Congress enacts general land laws opening up "public lands" to private entry and settlement, it generally does not allow private parties to lay claims to submerged lands. See *Shively*, 152 U.S. at 48 (Congress may convey submerged lands, but has "never undertaken by general laws to dispose of such lands."); *Utah*, 482 U.S. at 203-204. Those cases shed no light on the meaning of the term "public lands" in the context presented here, where Congress has authorized the President to withdraw

The Pickett Act does not define the term "public lands." The Master therefore examined the context provided by the Act, and he concluded that Congress intended the term to include submerged lands. He noted at the outset that it is unlikely that Congress employed the term "public lands" in the limited sense that Alaska urges. The Pickett Act categorically reached "any of the public lands of the United States including the District of Alaska," which indicated that the President's power extended to all government-owned lands within the District. § 1, 36 Stat. 847. As the Master noted, the concept of "public lands" in Alaska has never been limited to uplands. Report 408-409. See, e.g., *United States v. Alaska*, 423 F.2d 764, 766 (9th Cir.) ("In construing the pertinent Alaskan statutes, the courts have consistently held that the words 'public domain', 'public lands' and 'land', include land under water."), cert. denied, 400 U.S. 967 (1970).⁴³ Indeed, at the time that Congress enacted the Pickett Act, it had already begun to open submerged lands to entry under the mining laws.

and reserve specific tracts of land for public purposes. Indeed, in that context, this Court itself has described lands beneath inland navigable waters as "public lands." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 633 (1970) ("the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands" (emphasis added)). See *Utah*, 482 U.S. at 212 n.4 (White, J., dissenting).

⁴³ As the Master explained, this Court expressly recognized that point in *Hynes*, *supra*. See Report 409 n.51. In that case, Congress authorized the Secretary of the Interior to create an Indian reservation from "public lands which are actually occupied by Indians or Eskimos." Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250. The Court upheld the Secretary's designation of an upland area "and the waters adjacent thereto extending 3,000 feet from the shore line at mean low tide," Public Land Order 128, 8 Fed. Reg. 8557 (1943). See *Hynes*, 337 U.S. at 116; see also *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (discussed at Report 399-400); cf. *Amoco Production Co.*, 480 U.S. at 546-548.

Report 408 & n.49. The Master correctly recognized that it is unlikely that Congress meant to limit the reach of the Pickett Act to uplands within the District of Alaska, and thereby prevent federal withdrawals of submerged lands for *public* purposes, when at the same time Congress was opening those lands to *private* appropriation. See *ibid.*⁴⁴

Furthermore, Congress's objectives in enacting the Pickett Act demonstrate that Congress intended to allow the President to reserve submerged lands. See Report 410-414. Congress adopted the Pickett Act to protect public interests that extended beyond uplands and that could not be readily protected by anything short of fee ownership. As the Master explained, Congress developed the legislation specifically out of concern that the President needed authority in the interest of national security to withdraw land containing oil deposits. *Id.* at 411-

⁴⁴ Contrary to Alaska's suggestion (Alaska Except. Br. 59), the situation presented here is starkly different from that in *Utah*. In that case, the Court concluded that a provision of the Sundry Appropriations Act of 1888, ch. 1069, 25 Stat. 526-527 (which appropriated funds for surveying arid lands, and reserved from sale, entry, settlement or occupation "lands which may hereafter be designated or selected by such United States surveys" for reservoir sites), "did not necessarily refer to lands under navigable waters," because those lands "were already exempt from sale, entry, settlement or occupation under the general land laws." *Utah*, 482 U.S. at 198-199, 203. As noted above, that was not true here. Furthermore, Alaska's observation (Alaska Except. Br. 60) that the Pickett Act continued to allow mining entry misses the Master's point: Federal reservations are less intrusive on State equal footing interests than federal conveyances, and therefore it would have been anomalous for Congress to forbid the President from reserving submerged lands, revocably and for public purposes, when it was, at the same time, authorizing private parties to appropriate those lands permanently for private use.

414.⁴⁵ The Pickett Act's objective of preserving federal ownership of petroleum resources, which exist in subsurface formations that extend indiscriminately beneath uplands and submerged lands, would have been severely hampered if the United States could reserve only the upland portions of oil-bearing lands. That problem would have been particularly acute in regions like the National Petroleum Reserve, which contain extensive areas of inland waters. See *id.* at 348, Figs. 8.1-8.3. In those regions, reservation of only the uplands would deny the federal government an incalculable amount of the very oil deposits it sought to reserve, and would generate extraordinarily complex disputes concerning ownership, division, and drainage of the subsurface oil deposits. See *id.* at 427

⁴⁵ The Pickett Act originated out of a continuing controversy over whether the President could withdraw lands to create petroleum reserves for the Navy. See *United States v. Midwest Oil Co.*, 236 U.S. 459, 466-469 (1915) (describing the controversy). As a result of that controversy, the President sought express authority from Congress to make withdrawals for petroleum reserves and other purposes. 45 Cong. Rec. 621, 622 (1910) (Letter from President Taft). Congress held hearings in which it received testimony on the President's need to set aside oil-bearing lands while protecting existing private claims. *Oil-land Withdrawals and the Protection of Locators of Oil Lands: Hearings on H.R. 24070 Before the House Comm. on the Public Lands*, 61st Cong., 2d Sess. (1910). Congress ultimately enacted the Pickett Act, which provided that withdrawn lands shall not be open to "exploration, discovery, occupation and purchase" for purposes of locating oil. § 2, 36 Stat. 847. See generally Robert W. Swenson, *Legal Aspects of Mineral Resources Exploitation*, in Paul W. Gates, *History of Public Land Law Development* 731-745 (1968); S. Doc. No. 187, 78th Cong., 2d Sess. (1944) (History of the Naval Petroleum Reserves); Max W. Ball, *Petroleum Withdrawals and Restorations Affecting the Public Domain* (U.S. Geological Survey Bull. 623) (1916).

& n.68; see generally *Railroad Comm'n v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 579-580 (1940).⁴⁶

The Master thoroughly examined the matter, and he correctly concluded that the term "public lands," as used in the Pickett Act, includes submerged lands. The Master's conclusion is buttressed by the fact that the President, who was charged with administering the statute through the withdrawal of specific tracts, contemporaneously construed the term to include submerged lands. Moreover, as we explain below (see pages 66-72, *infra*),

⁴⁶ In this respect as well, the situation presented here is distinguishable from that in *Utah*, where Congress had enacted legislation reserving reservoir sites out of concerns, unrelated to submerged lands, that those sites would become unavailable on account of settlement, land speculation, and monopolization. See 482 U.S. at 203. In that situation, Congress did not need to reserve associated submerged lands, because the government's interests in those lands could be accommodated through its navigational servitude, see *United States v. Cherokee Nation*, 480 U.S. 700, 706-707 (1987), or through specific conditions on the construction of federal projects, see *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186, 199-203 (1937). No similar avenues were available here to protect the government's interest in oil reserves in the submerged lands themselves.

Furthermore, the Pickett Act is unlike the legislation involved in *Utah*, because it did not result in a broad and general reservation of all lands of a particular character and their subsequent availability for settlement under the homestead laws, 482 U.S. at 199, 203-204, "but rather for withdrawals or reservations in particular cases" for public purposes. Report 413-414. Hence, this case does not present the "inconceivable" situation, posed in *Utah*, that, if Congress included submerged lands within the statute's coverage, it had effected a wholesale abandonment of the policy against permitting the sale or settlement of land underlying navigable waters under the general land laws and instead preserving submerged lands for future States. 482 U.S. at 204. The Pickett Act gave the President discretion to determine "[w]hether there is need in any particular case to include lands under navigable waters," and those judgments would then be subject to congressional review. See Report 414.

Congress subsequently ratified the President's construction in the Alaska Statehood Act, which recognized that the United States owns the lands within the boundaries of the National Petroleum Reserve.

2. Alaska asserts (Alaska Except. Br. 61-62) that there was no "public exigency" requiring the President to include submerged lands within the National Petroleum Reserve. As this Court explained in *Utah*, however, the term "public exigency" describes the "congressional policy" that the Court has "inferred"—"not a constitutional obligation"—with respect to the "grant[ing] away" of land under navigable waters. 482 U.S. at 197. The Court has repeatedly recognized that the United States possesses power under the Constitution to dispose of submerged lands in pre-statehood territories

in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

Id. at 196-197 (quoting *Shively*, 152 U.S. at 48); *Montana v. United States*, 450 U.S. 544, 551 (1981) (accord). In order to satisfy the Constitution, then, the United States need show no more than that the reservation or other disposition of the submerged lands fulfills a "public purpose[]" appropriate to the objects for which the United States hold the Territory." Cf. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 85-86 (1922) (leaving open whether the United States must satisfy even that test).

The term "public exigency" is, at most, only a guide to assist a court in determining whether submerged land has been granted away in a particular instance. Where, as here, the circumstances make clear that submerged lands

are included within a Reserve and were withheld from the State, the "public exigency" formulation is not an independent, judicially enforceable barrier to accomplishing that end.

In any event, Alaska is mistaken in suggesting the extreme view (Alaska Except. Br. 61-62) that this Court's use of the term "public exigency" in *Utah*, 482 U.S. at 197-198, denotes a dire national emergency. The Master correctly concluded that a "public exigency" exists if there is an important public need justifying the conveyance or reservation. See Report 417-419.⁴⁷

The Master was also correct in his conclusion that the Nation's need for the National Petroleum Reserve manifestly qualifies as a "public exigency." See Report 423-430. As he explained, the National Petroleum Reserve was explicitly created at the close of World War I to provide a "future supply of oil for the Navy," which "is at all times a matter of national concern." See *id.* at 424 (quoting Executive Order No. 3797-A). Congress itself expressly approved of the creation of such Reserves, noting the Nation's need "to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy in any emergency threatening the national security." See *id.* at 425 (quoting S. J. Res. 54, 68th Cong., 1st Sess., 43 Stat. 5, 6 (1924)). See also Report 426-427 (noting the Reserve's additional purpose to "promote development" in Alaska).

Alaska is mistaken in its contention (Alaska Except. Br. 62) that there was no need to reserve submerged lands for that purpose. The United States was aware that there

⁴⁷ See, e.g., *Montana*, 450 U.S. at 556 (suggesting that the United States might retain submerged lands for an Indian Tribe if fishing were "important to [the Tribe's] diet or way of life"); accord *Hynes*, 337 U.S. at 116; *Alaska Pacific Fisheries*, 248 U.S. at 87.

were "large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast," Report 424 (quoting Executive Order No. 3797-A), but the exact locations of those fields were unknown. The United States needed to control both the uplands and the submerged lands within the National Petroleum Reserve's boundaries to avoid conflicting claims to, and drainage of, the anticipated, but then unidentified, underground deposits. *Id.* at 427-428. The United States clearly intended to include, and did include, all of the oil bearing lands within the boundaries of the Reserve. *Id.* at 428-429.

3. Alaska also argues that "the Alaska Statehood Act is not 'affirmative' evidence that Congress intended to defeat Alaska's title." Alaska Exempt. Br. 62-66. That contention misconceives the Court's *Utah* decision and the relevant provisions of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). The Master properly applied *Utah* to the circumstances presented here and concluded that Congress unambiguously expressed its intention, through Section 11(b) of the Alaska Statehood Act, to defeat the State's title to the submerged lands. Report 430-440.

In *Utah*, the Court assumed *arguendo* that Congress could reserve submerged lands beneath inland waters for an appropriate federal purpose, but it concluded that the mere fact that Congress had included such lands within the boundaries of a federal reservation did not, by itself, manifest an intention to retain those lands. 482 U.S. at 202. It reasoned that, when Congress conveys submerged land to a private party, "of necessity it must also intend to defeat the future State's claim to the land," but when submerged lands are included within a reservation, that action is not necessarily meant to deprive a future State of title to the lands. *Ibid.* Therefore, a court must determine

whether there was an intent "to defeat the future State's title to such land." *Ibid.* That is what the Master did in this case.

When Congress drafted the Alaska Statehood Act, it gave specific attention to the President's establishment of the National Petroleum Reserve. The President, the "constitutional officer" in whom Congress vested the authority to make withdrawals and reservations to serve paramount public purposes, compare *Franklin v. Massachusetts*, 505 U.S. 788, 799-800 (1992), had deliberately drawn the boundaries of the National Petroleum Reserve to include submerged lands along the Arctic Coast. See Report 421. The location of the boundary was not mere happenstance. It was based on the President's specific determination that "there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast" that should be retained for the Navy's use. *Id.* at 424 (quoting Executive Order No. 3797-A). The Executive Order's designation of the boundary to include coastal submerged lands clearly manifested the federal government's intention to defeat a future State's title to those lands. The transfer of those lands to the State—and the consequent loss of ownership rights to the oil deposits therein—would have thwarted the very purpose of including those lands within the Reserve. As the Master succinctly put it, "[i]f the drafters had not intended to reserve the resources in submerged lands, there would have been no point in their drawing the boundary to include them." *Id.* at 422.

Congress was placed on notice by the terms of the Executive Order that the President had determined the need to include the submerged lands as part of the National Petroleum Reserve. See Pickett Act, § 3, 36 Stat. 848 (requiring the Secretary of the Interior to notify

Congress of withdrawals).⁴⁸ Congress had the power to revise that determination, see § 1, 36 Stat. 847, but did not do so. To the contrary, Congress ratified the President's establishment of the Reserve through the Alaska Statehood Act, which, in Section 5(a), retains federal ownership of the Reserve, including the submerged lands therein. See U.S. Except. Br. 37-38.⁴⁹

As the Master explained, Congress acknowledged and ratified the President's retention of the National Petroleum Reserve in Section 11(b) of the Alaska Statehood Act, which states:

Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever *over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States* and held for military, naval, Air Force, or Coast Guard purposes, *including naval petroleum reserve numbered 4* [the National Petroleum Reserve], whether such lands were ac-

⁴⁸ As the Master explained, there is a rich legislative history confirming Congress's awareness that the Executive Order retained not only the offshore lagoons, but also the lakes and rivers, within the Reserve. See Report 434-440.

⁴⁹ As we explain in our opening brief, the Alaska Statehood Act accomplishes that result through Sections 5 and 6(m), 72 Stat. 340, 343. Section 5 provides that the United States "shall retain title to all property, real and personal, to which it has title," except as provided in Section 6; and Section 6(m) incorporates the Submerged Lands Act, including its reservation of submerged lands "expressly retained" by the United States, 43 U.S.C. 1313(a). See U.S. Except. Br. 37-38.

quired by cession and transfer to the United States by Russia and set aside by Act of Congress or by Executive order.

72 Stat. 347 (emphasis added). As the plain text of Section 11(b) provides, Congress by law affirmed that the United States had "acquired," and therefore "owned," the "parcel[] of land" that is now known as the National Petroleum Reserve. *Ibid.* But Congress not only recognized that the United States retained title to those lands, it further stated that, "[n]otwithstanding the admission of the State of Alaska into the Union," it would reserve the power of "exclusive legislation" over them. *Ibid.*⁵⁰

Alaska objects that Section 11(b) "does not address *title* at all," but is concerned merely with Congress's retention of exclusive legislative jurisdiction under the Enclave Clause, U.S. Const. Art. I, § 8, Cl. 17. See Alaska Except. Br. 63-64. Alaska misapprehends the significance of Congress's reservation of that power. When the United States specifically exercises its power of "exclusive legislation" under the Enclave Clause, it necessarily acquires title to the property. See, e.g., *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 527 (1938); *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-142 (1937).⁵¹ Hence,

⁵⁰ Section 11(b) also contains two provisos that qualify the reservation of exclusive jurisdiction. See § 11(b)(ii) and (iii), 72 Stat. 347. Alaska no longer argues that those provisos are relevant to the question presented here. See Alaska Except. Br. 62-66; compare Report 433.

⁵¹ The Enclave Clause authorizes the exercise of "exclusive legislation" over "all Places purchased by the Consent of the Legislature of the State in which the Same shall be." U.S. Const. Art. I, § 8, Cl. 17. This Court has recognized, however, that the United States may acquire land by means other than purchase. See *Collins*, 304 U.S. at 527 ("other lands composing the Park had been in the proprietorship of the national government since cession by Mexico").

Congress's explicit assertion, pursuant to the Enclave Clause, of the power of "exclusive legislation" over the National Petroleum Reserve clearly demonstrates Congress's affirmative intention that the United States—rather than Alaska—owned and retained all of the lands therein. See *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186, 208 (1937) ("federal intent * * * is shown not merely by the action of administrative officials, but by the deliberate and ratifying action of Congress").⁸²

Congress's reservation of its power of "exclusive legislation" over those oil-bearing lands leaves no doubt that

⁸² Alaska cites as contrary authority a district court's recent interlocutory order involving Public Land Order (PLO) 82, 8 Fed. Reg. 1599 (1943), which set aside lands in northern Alaska to preserve minerals for military use. Alaska Exempt. Br. 64-65. See *Alaska v. United States*, No. A87-0450-CV (HRH) (D. Alaska Mar. 29, 1996) (reproduced in Alaska Exempt. Br. App. B). The issue in that litigation is whether PLO 82 expressly retained the beds of rivers and other inland waters therein. The district court held that the Secretary of the Interior intended PLO 82 to retain those submerged lands in federal ownership. Alaska Exempt. Br. App. B at 42. The court concluded, however, that Section 11(b) of the Alaska Statehood Act did not manifest Congress's intention to defeat the State's title, because Section 11(b) "make[s] no reference to lands beneath navigable waters in PLO 82." *Id.* at 54. That court, which did not have the benefit of the Master's ruling in this case, misunderstood the significance of Section 11(b). As we have explained above, if Congress elects to exercise exclusive legislation pursuant to the Enclave Clause over a federal reservation, then Congress has clearly manifested its intention to retain ownership of the lands in the reservation. That conclusion takes on particular force in the case of the National Petroleum Reserve because, as we explain in the text, *infra*, Congress not only manifested its intention to retain ownership of the Reserve, but it did so with the understanding that it would own the submerged lands within its boundaries. The United States has made a similar submission, but on a different factual basis, in the PLO 82 litigation. The district court's erroneous understanding of Section 11(b), however, prevented it from reaching that issue.

Congress intended to defeat the State's title to all lands within the boundaries of the National Petroleum Reserve, including the submerged lands. As the Master pointed out, "[n]othing in section 11(b) suggests that different jurisdictional patterns were to apply within the Reserve, depending on whether the lands were upland or submerged." Report 434. Congress understood from the Executive Order that the United States had an extraordinary interest in the Reserve because it contained oil deposits set aside for national security purposes. The President described in his Executive Order the potential oil fields along the Arctic coast, and he drew the boundaries of the Reserve accordingly. It would have made no sense for Congress, which expressly acknowledged the "Executive order" in the text of Section 11(b) of the Alaska Statehood Act, to ratify the President's withdrawal and extend its power of exclusive legislation over the Reserve, but not to retain ownership of the valuable submerged lands that the Executive Order explicitly included within it.⁸³

As this Court's *Utah* decision recognizes, the issue whether Congress has retained submerged lands is ultimately one of congressional intent. See 482 U.S. at 202. The Master correctly concluded that Congress unambiguously stated its intentions through the Alaska Statehood Act. This is not a case in which Congress created a pre-statehood federal reservation, but did not

⁸³ That conclusion is bolstered by Congress's contemporaneous enactment of other legislation governing oil and gas leasing of Alaska submerged lands, which was fashioned to exclude leasing within the National Petroleum Reserve. See Report 434-438 (discussing Act of July 3, 1958, Pub. L. No. 85-505, 72 Stat. 322, and Act of Sept. 7, 1957, Pub. L. No. 85-303, 71 Stat. 623). As the Master explained, those Acts were premised on the assumption that "submerged lands in the Reserve would remain the property of the United States." Report 436; see *id.* at 438.

need title to submerged lands, and therefore presumptively intended that the State would receive title to those lands upon admission to the Union. See *ibid.* Rather, the President and Congress recognized an overriding need to retain oil-bearing lands within the National Petroleum Reserve—including its submerged lands—in federal ownership for purposes of national security. The Master correctly concluded that Congress affirmatively intended “to defeat Alaska’s title to those lands.” Report 440.

C. The United States’ Retention Of Submerged Lands Through A Statehood Act Does Not Violate The Equal Footing Doctrine

Alaska asserts that the Equal Footing Doctrine prohibits the United States’ retention of submerged lands in a statehood act (Alaska Except. Br. 66-70) and, alternatively, that any federal retention of submerged lands should be limited to those rights “absolutely necessary rather than fee title” (*id.* at 70-71). Those arguments do not require extended discussion.

1. Alaska’s assertion that Congress cannot retain submerged lands through a statehood act is both counter-intuitive and wrong. Alaska does not contest the principle that the United States may retain submerged lands beneath navigable waters for appropriate public purposes. See pages 53-54 & note 37, *supra*. If Congress has the power under the Equal Footing Doctrine to retain those lands, then it can exercise that power through legislation of its choice. A statehood act, which specifies the boundaries and landholdings of a new State, see Alaska Statehood Act, *supra*, is a logical place for Congress to set forth whether and to what extent submerged lands are reserved for public purposes. The retention of such lands is not an unlawful condition upon the State’s admission to the Union, because the State has no right to submerged lands

that Congress has deemed it necessary to retain for an appropriate public purpose. Compare *Coyle v. Smith*, 221 U.S. 559, 565, 574 (1911) (Congress cannot dictate the location of a State’s capital in a statehood act, because it has “no power” to make that choice, which rests entirely with the State).

2. Alaska asks this Court to second guess Congress’s judgment as to whether the national interest requires the United States to retain full fee title to the submerged lands within the National Petroleum Reserve. The question whether the United States should retain full title, or some lesser aliquot, is a matter committed to Congress’s discretion under the Property Clause. As this Court has repeatedly emphasized, “determinations under the Property Clause are entrusted primarily to the judgment of Congress.” *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976). In this case, Congress expressed the intention to retain all of the lands within the National Petroleum Reserve. See Report 440-445. Congress can change its ownership interest if it finds a need to do so. As the enactment of the Submerged Lands Act demonstrates, Congress has been attentive to state interests in coastal resources, and there is no reason to expect that Congress “will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission.” *California I*, 332 U.S. at 40.

CONCLUSION

The exceptions of the State of Alaska should be overruled.

Respectfully submitted.

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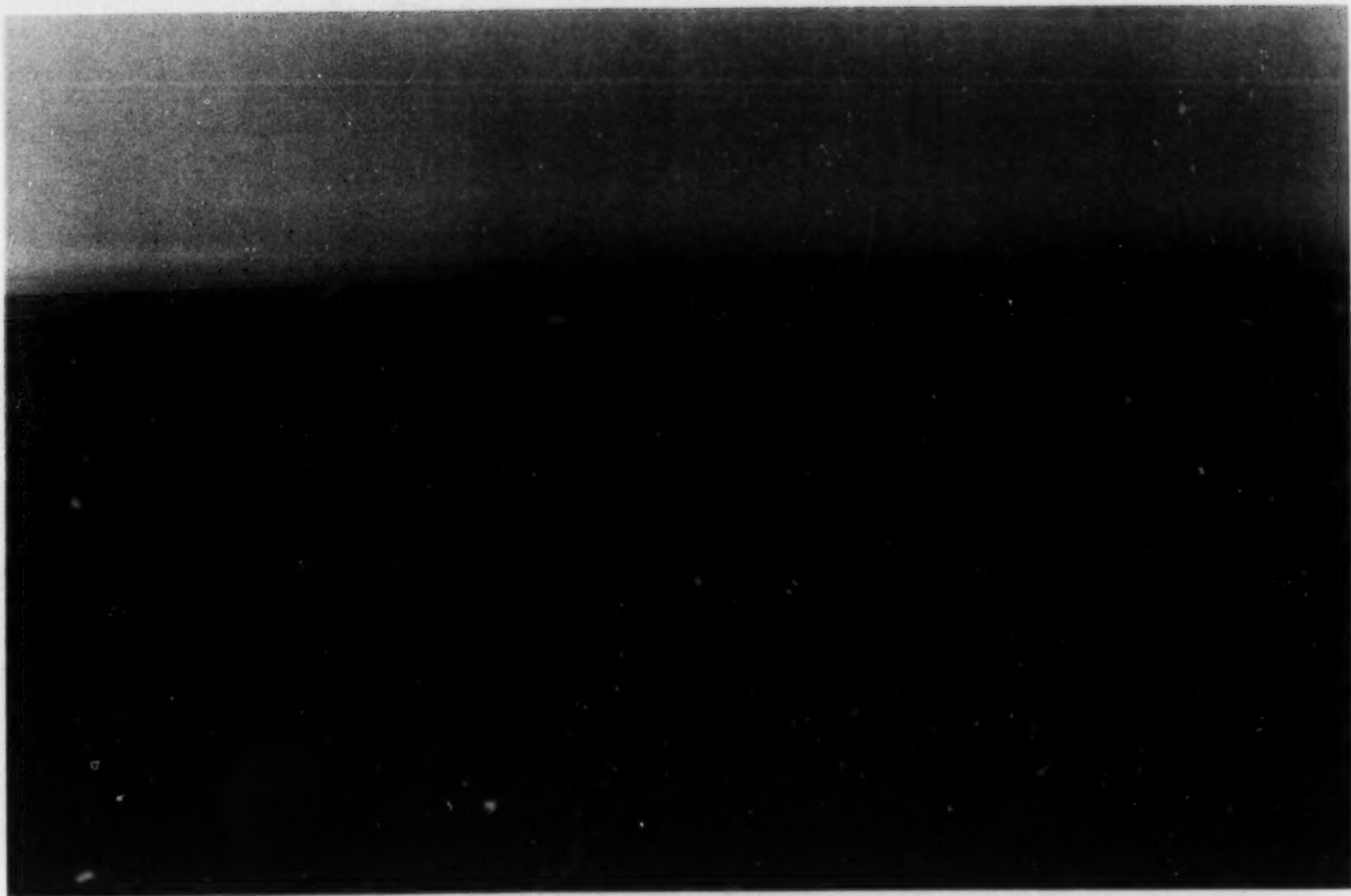


Figure 1. Photograph of Dinkum Sands, July 25, 1979
(U.S. Exh. 84A-507a). See Report 247.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

UNITES STATES OF AMERICA, *Plaintiff,*

v.

STATE OF ALASKA

ON REPORT OF THE SPECIAL MASTER

**BRIEF OF THE STATES OF ALABAMA, ARIZONA,
CALIFORNIA, DELAWARE, HAWAII, IDAHO, LOUISIANA,
MISSISSIPPI, MONTANA, NEVADA, NORTH CAROLINA,
NORTH DAKOTA, UTAH, VERMONT, VIRGINIA AND THE
VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF THE
STATE OF ALASKA**

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 84, Original

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF ALASKA

INTRODUCTION AND INTEREST OF AMICUS CURIAE

For over 200 years, the Equal Footing doctrine expressed in the Northwest Ordinance of 1787 and acknowledged as a constitutional rule by this Court has been a linchpin of our federal system. Inherent in the exceptions of the United States taken to the Special Master's Report is a crabbed and narrow construction of that doctrine that would restrict it to "inland waters" and characterize the historic balancing of state and federal interests in the Submerged Lands Act, ch. 65, 67 Stat. 29 (codified at 43 U.S.C. §§ 1301 *et seq.*), as merely another federal grant, subject to the same rules of construction as one to any private individual or corporation.¹ Furthermore,

1. The federal position, expressed in the Exceptions to the Special Master's Report, was more baldly asserted in 1984 by a then-Deputy Solicitor General: "[f]rom the federal perspective, it is perfectly obvious that the beds of navigable waters, inshore and offshore—traditionally the arteries of interstate and foreign commerce impressed with a federal navigational servitude—belong, if to anyone, to the nation rather than the individual states," but that "alas, our Supreme Court went astray in the 1840s" when it established the rule of state ownership. L.F. Claiborne, *Federal-State*

the United States urges a broad and unwarranted construction of this Court's standards governing states' interests in their inland waters contending, in effect, that the mere creation of a reserve shows the "public exigency" needed to withhold state waters, and an incomplete withdrawal defeats the states' constitutional interests.

Historic principles of federalism are not to be dealt with so lightly. The states represented in this brief are not mere federal grantees. They have a stewardship interest in the thousands of miles of coastline and inland waters that this Court has characterized as an inherent attribute of their sovereignty.

We note that another case pending before the Court presents related issues and an overlapping issue. That case, *Idaho v. Coeur d'Alene Tribe of Idaho*, No. 94-1474, presents the question whether the Tribe can maintain an action against the State, notwithstanding the bar of the Eleventh Amendment and the strong presumption of State ownership, to adjudicate its claim to the bed of the navigable Lake Coeur d'Alene. It is also raises an issue presented here, that is, whether a pre-statehood executive reservation, not specifically authorized by Congress,

Offshore Boundary Disputes: The Federal Perspective, Law of the Sea Institute Eighteenth Annual Conference (1984), reprinted in *The Developing Order of the Oceans* 360 (R. Krueger and S. Riesenfeld, eds., 1985). Although Mr. Claiborne, a distinguished attorney awarded the sobriquet "The Celestial General," see L. Caplan, *The Tenth Justice* 155 (1987), disavowed any intention to represent the official position of the United States, he went on to say, "This is not to suggest that the government would have any cause to disagree with the very loyal and presumably correct statements made in this paper." L.F. Claiborne, *supra*, at 374 n.1. Indeed, the federal government's brief in *United States v. California*, 332 U.S. 19 (1946), stated that the rule applying the Equal Footing doctrine to support state ownership of tidelands and lands underlying navigable inland waters "is believed to be erroneous, but the government does not ask that it be overruled." Brief for the United States in Support of Motion for Judgment (No. 12, Original) (Oct. Term, 1946) (filed Jan. 1947) 22.

can defeat a future State's entitlement under the equal footing doctrine. Many of the States appearing as *amici* here appeared as *amici* in that case as well.

SUMMARY OF ARGUMENT

1. A clear and unequivocal intent of Congress based on international duty or public exigency must be shown before lands underlying navigable waters may be deemed to have been withheld from a state. Since the beginning of our Republic, the people of each state held "all their navigable waters, and the soils under them" for common use, as an attribute of sovereignty. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 222-29 (1845).

2. Congress must show an affirmative intent to defeat a future state's title to such lands.

3. The executive branch alone may not act to defeat a state's interests in navigable waters. Congress must expressly and unequivocally take action, based on the criteria established in earlier decisions of this Court.

4. These principles are applicable whether the state's interest in the lands in question arises under the Equal Footing doctrine or under the Submerged Lands Act, because Congress intended in that Act to confirm the states' rights in their navigable waters and restore the status quo in that respect.

ARGUMENT

I.

THE STRONG PRESUMPTION AGAINST DIVESTITURE OF A STATE'S ENTITLEMENT TO ITS NAVIGABLE WATERS EXTENDS TO SUBMERGED LANDS AS WELL AS TO "INLAND NAVIGABLE WATERS"

A. The Equal Footing Doctrine Historically Has Applied To All Of A State's Navigable Waters.

In enunciating the Equal Footing doctrine, this Court has repeatedly characterized its significance in our federal system. The states' interests in navigable waters, acquired by the original colonies when "the people of each state became themselves sovereign," *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 220 (1845) (citation omitted), and reserved to the newly admitted states as well, have been described as inherent attributes of sovereignty, "so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign . . . or transfer of sovereignty itself." *United States v. Oregon*, 295 U.S. 1, 14 (1935).

For many years, it was assumed that submerged lands within the territorial sea, as well as tidelands and lands underlying navigable lakes and rivers, belonged to the states, as successors to the rights of the British crown. The common law made no distinction between the sovereign's interest in tidelands and those lands underlying the territorial sea. "By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King." *Shively v. Bowlby*, 152

U.S. 1, 11 (1894) (citing Lord Chief Justice Hale in *De Jure Maris*). Thus, this Court concluded, "In England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea below ordinary high water mark, is in the King" *Id.* at 13.

As this Court stated in 1842, "[W]hen the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). The thirteen original states claimed ownership and control of the submerged lands under their coasts, as did those states subsequently admitted to the union. "It was substantially agreed that the 13 original Colonies owned the lands within three miles of their coasts because of their sovereignty and the alleged international custom" *United States v. Louisiana*, 363 U.S. 1, 22 (1960); *Pollard's Lessee*, 44 U.S. (3 How.) at 230. However, in *United States v. California*, 332 U.S. 19, 38-39 (1947), the Court accepted the arguments of the federal government that interests of national defense and international obligations compelled the holding that "paramount rights" in the submerged lands should rest in the United States.

More years of litigation over the meaning of "paramount rights" was forestalled by Congress's enactment of the Submerged Lands Act, which was expressly intended to reverse the Court's holding with respect to the submerged lands seaward of low tide out to their seaward boundaries. Nothing in the Act, its history, or this Court's subsequent interpretations of it suggest that in restoring the status quo with respect to the states' submerged lands, the presumption against frustration of those rights should be changed. Accordingly, the rules this Court has set forth in *Montana v. United States*, 450 U.S. 544

(1981) and *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987) remain in effect.

B. States' Lands Beneath Navigable Waters May Be Conveyed Or Reserved Only Under Limited Circumstances Not Demonstrated Here.

Under established principles, pre-statehood grants may be upheld only under "the most unusual circumstances," *Utah Div. of State Lands*, 482 U.S. at 197, and only "international duty or public exigency" has justified such actions. *Shively*, 152 U.S. at 48-50. Such conveyances are "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). Finally, such a conveyance must leave no doubt that it was intended to "embrace [] the land under the waters" affected. *Montana*, 450 U.S. at 552.

In the controversy before this Court, the record shows only an interest on the part of the executive to set aside large portions of public lands encompassing navigable waters for the purposes of a petroleum reserve and a wildlife refuge. No showing has been made that respect for equal footing rights and navigable waters within these areas is incompatible with the reservation. *Cf. Montana*, 450 U.S. at 556.

The presumption against such a pre-statehood grant or reservation may only be overcome by a showing that: 1) Congress clearly intended to include the submerged land within the reservation, and 2) Congress affirmatively intended to defeat the future state's title to the submerged lands. *Utah Div. of State Lands*, 482 U.S. at 202. Neither of those showings has been made here.

C. The Submerged Lands Act Restores States' Equal Footing Rights To Submerged Lands Within Their Boundaries.

As this Court has stated, "The very purpose of the Submerged Lands Act was to undo the effect of this Court's 1947 decision in *United States v. California*." *United States v. California*, 436 U.S. 32, 37 (1977). In examining the legislative history of the Act, this Court has noted that the 1953 Act was the culmination of many years of attempts to pass such legislation. *Louisiana*, 363 U.S. at 6 n.4.² The relevant legislative history cited by this Court in the *Louisiana* case makes it abundantly clear the purpose of Congress was to undo the 1947 decision with respect to the three-mile belt. A representative passage, from a Report on S.J. Res. 13 states: "The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past--that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution." S. Rep. No. 133, 83d Cong., 1st Sess., to accompany S.J. Res. 13 at 7-8 (Mar. 27, 1953), quoted in *Louisiana*, 363 U.S. at 19 n.17.

Any possible doubt on this question was removed by this Court's decision with respect to the Channel Islands off

2. "The legislative history of all the bills considered prior to enactment of the Submerged Lands Act in 1953 is directly relevant to the latter Act, since the purposes and phraseology of such bills, and the objections raised against them were substantially similar. During the hearings on the final bills [S.J. Res. 13 (1953) became the Submerged Lands Act], all prior hearings on predecessor bills were expressly incorporated into the record . . ." *Louisiana*, 363 U.S. at 17 n.16 (emphasis added).

California's Coast. There, as mentioned, the court held, "The very purpose of the Submerged Lands Act was to undo the effect of this Court's 1947 decision in *United States v. California*." *California*, 436 U.S. at 37. Thus, an attempted reservation of lands that would have been federally-owned under the Submerged Lands Act failed because the passage of the Submerged Lands Act wiped out the underlying federal claim.

If Congress intended to restore the states' interests in the three-mile belt to their pre-*California* position, as the history of the Submerged Lands Act abundantly shows, then the states are entitled to "sovereignty and jurisdiction" over these lands. *Pollard's Lessee*, 44 U.S. (3 How.) at 229. "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers." *Id.* at 230.

II.

ONLY CONGRESS CAN DEFEAT THE STATES' PRESUMPTIVE RIGHT TO LANDS ACQUIRED UNDER THE EQUAL FOOTING DOCTRINE AND THE SUBMERGED LANDS ACT

The decisions of this Court respecting states' interests in their submerged lands reflect two principles: 1) The executive branch has no inherent authority to withhold submerged lands, 2) Congress cannot impliedly delegate to the executive power to defeat a future state's equal footing title to submerged lands. Or, as this Court has stated: "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority." *Sioux Tribe v. United States*, 316 U.S. 317, 326 (1942).

In *Sioux Tribe*, this Court held that the executive had no general power to convey public lands during the territorial period. *Id.* at 331. What implied delegation of power the executive possessed existed with respect to public lands, not submerged lands constituting an inherent attribute of state sovereignty. *Oregon*, 295 U.S. at 14. Although the Court found that with respect to the public lands, "the long-continued practice, [and] the acquiescence of Congress" justified upholding limited executive reservations, *Sioux Tribe*, 316 U.S. at 326 (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 483 (1915)), such a delegation was never extended to navigable waters.

Furthermore, clear and specific intent on the part of Congress must be required to find that the United States authorized a pre-statehood reservation of submerged lands in light of principles of federalism. To hold otherwise would

permit the constitutional balance between states and the federal government to be changed unilaterally by executive action.

A fortiori, a mere application for withdrawal, not approved until after statehood, cannot have the effect of defeating a State's equal footing title. This unconsummated act of the executive branch cannot be sustained.

CONCLUSION

The principles here go far beyond the competing claims of Alaska and the federal government to certain submerged coastal lands. In a line of decisions beginning in 1842, this Court has properly held that the constitutionally conferred interests of states in the navigable waters within their boundaries and along their coastlines were an attribute of sovereignty, to be defeated only by the most unequivocal expressions of congressional intent. Congress confirmed their rights in the Submerged Lands Act, with the clear intent to restore state sovereign interests in the three-mile belt. Those rules should be reaffirmed here.

Respectfully submitted,

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Supreme Court, U.S.
F I L E D
OCT 10 1996

No. 84, Original

**IN THE SUPREME COURT
OF THE
UNITED STATES**

CLERK

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Plaintiff
v.
STATE OF ALASKA

ON THE REPORT OF THE SPECIAL MASTER
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

UNITED STATES OF AMERICA
Plaintiff

v.

STATE OF ALASKA

ON THE REPORT OF THE SPECIAL MASTER

REPLY BRIEF FOR THE STATE OF ALASKA

INTRODUCTION

In November of 1957, the Bureau of Sport Fisheries and Wildlife in the Interior Department applied for the withdrawal and reservation as a wildlife refuge of almost 9 million acres in northeastern Alaska. Report of the Special Master ("Report") at 447-50 and n.4. Although filed before Alaska's admission to the Union on January 3, 1959, the application was not acted on until December of 1960, nearly two years after Alaska statehood. *Id.* at 449. The United States contends that the lands applied for included vast areas of tide and submerged lands, and that the mere act of applying for their withdrawal deprived Alaska of its entitlement to these submerged lands under both the constitutional equal footing doctrine and the Submerged

Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301 *et seq.* (1988)) Exception of the United States and Brief for the United States in Support of Exception ("United States' Brief") at 31-53.

Alaska opposes the United States' exception on four grounds: (1) the application did not defeat Alaska's submerged lands entitlement under the constitutional equal footing doctrine; (2) the application did not defeat Alaska's submerged lands entitlement under the Submerged Lands Act; (3) Congress could not condition Alaska's admission to the Union on a relinquishment by the State of its submerged lands entitlement under the equal footing doctrine; and (4) in any event, Alaska's rights under the equal footing doctrine were defeated only to the minimum extent necessary to fulfill the purpose of the withdrawal.

The most troubling aspect of the United States' submission is its cavalier attitude toward Alaska's sovereign rights and, by extension, those of all other States. State ownership of lands underlying navigable waters within State boundaries is "an inseparable attribute of the equal sovereignty guaranteed to it on admission" to the Union. *United States v. Louisiana*, 363 U.S. 1, 16 (1960). The original thirteen States succeeded to the British Crown's sovereign title to such lands at the time of the Revolution. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). Title to such lands vests in subsequently-admitted States upon admission to ensure that they join the Union on an "equal footing" with the original thirteen. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1845).

To implement this equal footing doctrine, the United States holds such lands in a territory "in trust" for future States created out of that territory. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987) (quoting *Pollard*,

44 U.S. (3 How.) at 230). "[U]pon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the State of local sovereignty," *United States v. Oregon*, 295 U.S. 1, 14 (1935). Such title is "automatically vested," *Arizona v. California*, 373 U.S. 546, 597 (1963), and "is conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). While Congress has the power to defeat a new State's title to such lands by conveying them to a third party prior to statehood, it has never provided for disposal of submerged lands under the general public land laws; it will do so *only* in "exceptional instances when impelled . . . by some international duty or public exigency." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). Accordingly, there is a "strong presumption" against defeat of a new State's title which will not be inferred "unless the intention was definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters of the stream." *Montana v. United States*, 450 U.S. 544, 552 (1981) (quotations and citations omitted).

The Court has never held that a pre-statehood federal reservation (as distinct from a conveyance to a third party) can defeat State title under the equal footing doctrine, *Utah*, 482 U.S. at 200, much less that a mere application not acted on until long after statehood could have that effect. Assuming *arguendo* that it could, however, the United States first must show (a) that Congress clearly intended to include submerged lands in the reservation, and (b) that Congress affirmatively intended to defeat the future State's title to the lands. *Id.* at 202.

The United States concedes that some of the lands at issue under its exception -- tidelands and lands underlying inland navigable waters¹ -- are subject to the equal footing doctrine. United States' Brief at 51-53. The United States nonetheless relies on *United States v. California*, 332 U.S. 19 (1947) (the "1947 *California* decision"), which held that the equal footing doctrine does not extend offshore and the United States, not the individual States, had "paramount rights" to offshore submerged lands. United States' Brief at 31-33. From this, it argues that there is as strong a presumption in favor of continued federal ownership of such lands as there is

¹ As shown on the Master's Figures 9.1 and 9.2, Report facing p. 450, several of the disputed areas are juridical bays under Article 7 of the Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639, which the Court has adopted for Submerged Lands Act purposes. *United States v. California*, 381 U.S. 139, 161-67 (1965). On Figure 9.1, these areas at minimum include the inlet enclosed by Brownlow Point, the inlet enclosed by Konganevik Point, and Simpson Cove. On Figure 9.2, these areas at minimum include Arey Lagoon, Kaktovik Lagoon, Pokok Bay, Angoon Lagoon, Egaksrak Lagoon, and Demarcation Bay. All of the disputed lands, moreover, underlie a series of coastal lagoons enclosed by near-shore barrier islands separated by very narrow entrances all of which are less than ten miles across. See the Master's Figures 9.1 and 9.2, Report facing p. 450, and Report at 138-39 (all of the waters enclosed by the islands are within three miles of land and none of the closing lines is long enough to add any area to the three-mile belt). All of the lagoons accordingly are inland waters under the 10-mile rule that this Court found was the United States' policy from at least 1903 until 1961:

Prior to its ratification of the Convention on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles. This 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903.

United States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93, 106-07 (1985) (footnotes omitted). See Exceptions of the State of Alaska and Supporting Brief ("Alaska's Brief") at 7-43.

in favor of the States for lands subject to the equal footing doctrine. *Id.* at 33-34. It concedes that Congress, in the Submerged Lands Act, granted to the coastal States the offshore submerged lands within their boundaries. United States' Brief at 34-35. It claims, however, that the submerged lands at issue here fall within a statutory exception to Alaska's Submerged Lands Act grant² for lands "expressly retained" by the United States at statehood. *Id.* at 39, citing section 5(a) of the Act, 43 U.S.C. § 1313(a). In its view, the application at issue here designated the disputed lands as "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife" for purposes of section 6(e) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, 340-41 (1958) (reprinted as amended in 48 U.S.C. note preceding § 21 (1987)), and section 6(e) in turn "expressly retained" the lands at the time of statehood within the meaning of section 5(a) of the Submerged Lands Act. United States' Brief at 39. To the extent there may be doubt that the lands were "expressly retained," the United States contends that such doubts must be resolved in favor of the United States. *Id.* at 36 and 39. Finally, the United States submits that, if it prevails on this statutory argument as to Submerged Lands Act lands, it also should prevail as to equal footing doctrine lands.³ *Id.* at 51-53.

² Congress made the Submerged Lands Act applicable to Alaska in section 6(m) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, 343.

³ The United States' discussion of this last point is so cursory, however, that it should be deemed waived. Cf. Supreme Court Rules 24.1(i) (a brief for a petitioner or an appellant must contain "[t]he argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on" (emphasis added)), 24.2 (a brief for a respondent or an appellee "shall conform" to the same requirement), and 24.4 (a reply brief shall conform to the same requirement).

The United States is wrong on all counts. More fundamentally, however, the United States seeks to rewrite the law in a manner at odds with the decisions of this Court establishing and applying the equal footing doctrine, contrary to the intent of Congress underlying the Submerged Lands Act, and in violation of Alaska's constitutional right to admission to the Union on an equal footing with its sister States. In part I below, Alaska shows that the pre-statehood actions on which the United States relies did not defeat Alaska's submerged lands entitlement under the equal footing doctrine. In part II.A, Alaska demonstrates that Congress intended the Submerged Lands Act both to extend the equal footing doctrine offshore and confirm it as to tidelands and lands underlying inland navigable waters, so the same analysis must apply to both equal footing doctrine lands and offshore submerged lands within State boundaries. Part II.B establishes that the United States' statutory argument in any event fails on its own terms. In part III, Alaska explains that Congress could not condition Alaska's admission to the Union on the State's relinquishment of its submerged lands entitlement under the equal footing doctrine. Part IV shows that, to the extent any pre-statehood federal action defeated Alaska's title, it should in all events be limited to the minimum necessary to protect the interest claimed by the United States with all remaining incidents of ownership passing to Alaska.

SUMMARY OF ARGUMENT

I. This Court's equal footing doctrine decisions establish a number of stringent criteria for finding that a pre-statehood federal action has defeated a State's title to lands underlying navigable waters. The application at issue here meets none of these criteria.

A. Congress will defeat a State's equal footing doctrine title only in "exceptional instances when impelled to particular disposals by some international duty or public exigency." *Holt State Bank*, 270 U.S. at 55. The filing of an application, however, did not reflect the existence of such exceptional instances. Applications could be filed by virtually any federal, State, territorial, or municipal official. Once filed, the application would be reviewed to determine whether it should be granted. During the pendency of the review, there was no change in the way in lands were administered. This proves that, until a final decision on the application was made, there could be no exceptional instance supporting a congressional determination to deviate from its consistent policy of holding lands under navigable waters for the benefit of future States.

B. The application for withdrawal at issue here did not include submerged lands. The Court has established a presumption against the inclusion of lands underlying navigable waters in pre-statehood federal disposals or withdrawals and reservations, and the United States must "establish that Congress clearly intended to include land under navigable waters within the federal reservation." *Utah*, 482 U.S. at 202.

The application and the notice of it given to the public stated that the intent was to withdraw the applied for lands from "all forms of appropriation under the public land laws" except mineral leasing and mining locations. See Report at 447 n.1 (application) and 448 n.2 (public notice). Tidal and submerged lands were not available for appropriation under the public land laws, however, and this is evidence that they were included among the applied for lands. *Utah*, 482 U.S. at 203-04.

The boundary description of the applied for lands followed the "line of extreme low water." See Report at 449 n.2. Thus,

by its own terms, it excluded the lands underlying the lagoons below the line of extreme low water. This is especially true because the United States in several contemporaneous actions wrote boundary descriptions that explicitly included *all* areas underlying lagoons within their exterior boundaries.

While there are tidelands within the exterior boundaries of the applied for lands, that fact is not sufficient to overcome the presumption in favor of State title, particularly when there is no express reference to those lands as here. *Montana*, 450 U.S. at 554. In contemporaneous actions in Alaska, moreover, the United States expressly mentioned tidelands when it intended to include them in pre-statehood actions.

C. The United States must show that Congress affirmatively intended to defeat Alaska's title to equal footing doctrine lands, *Utah*, 482 U.S. at 202, and it has not. In fact, the legislative history of the Alaska Statehood Act reveals the Congress did *not* intend to defeat Alaska's equal footing doctrine title. Instead, Congress affirmatively intended that Alaska receive title under the equal footing doctrine to *all* lands underlying navigable waters within its boundaries at statehood.

II. The application did not defeat Alaska's submerged lands entitlement under the Submerged Lands Act.

A. The principles the Court established in the equal footing doctrine cases apply equally to offshore submerged lands not subject to the doctrine. The legislative history of the Submerged Lands Act reveals two congressional purposes.

First, Congress intended to rewrite the law for the future as it had been believed to be prior to this Court's 1947 *California* decision and *apply* the *Pollard* equal footing doctrine rule of State ownership to offshore submerged lands within State boundaries. Congress's second purpose was to prevent any further erosion of the States' submerged land rights by this

Court.

To implement this congressional intent, the Court must apply the same presumption in favor of State title to offshore submerged lands under the Submerged Lands Act as it applies to equal footing doctrine lands. As the United States relies on an exception to the Submerged Lands Act, the burden must fall on it to show that it comes within the exception and any doubts must be resolved in favor of Alaska. That exception, for lands "*expressly retained*" by the United States at statehood, 43 U.S.C. § 1313(a) (emphasis added), requires the United States to show affirmatively that Congress intended to prevent the transfer of the disputed lands to Alaska.

B. The application did not defeat Alaska's submerged lands entitlement under the Submerged Lands Act even under the United States' statutory analysis.

The United States claims that section 6(e) of the Alaska Statehood Act "*expressly retained*" the applied for lands for purposes of the Submerged Lands Act exception. This mischaracterizes the nature and the legal effect of the application, the function and purpose of section 6(e) of the Alaska Statehood Act, and the language and intent of the Submerged Lands Act exception.

Section 6(e) of the Alaska Statehood Act transferred certain property used for fish and wildlife management to the new State which, following statehood, would take over that traditional State responsibility from the federal government. Lands "*withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife*" were excepted from this grant. *Id.* (emphasis added.) The filing of the application here did *not* withdraw or otherwise set apart any lands *as a refuge or reservation*, for the administrative regulations governing such applications provided that there was no change in the administration of the lands unless and until the

application was granted. The legislative history of section 6(e) of the Alaska Statehood Act makes clear that Congress intended it to reach only lands which had in fact been withdrawn and reserved as wildlife refuges as of statehood, not lands where the decision whether to withdraw and reserve them remained pending. The Deputy Solicitor of Interior concluded shortly after statehood that applications for the withdrawal and reservation of tidelands for refuge purposes did not prevent the transfer of the applied for lands to Alaska. Solicitor's Opinion M-36562 (1959) (Alaska Exhibit ("Ak. Ex.") 76). That contemporaneous construction of the effect of the Submerged Lands Act grant on an application for withdrawal is entitled to deference by this Court. *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981).

The proviso in section 6(e) on which the United States relies, moreover, only excepted refuge lands from *that section's* grant of property to Alaska. It did not except anything from the Submerged Lands Act grant to Alaska under *section 6(m)* of the Statehood Act. In fact, the legislative history of the Alaska Statehood Act reveals that Congress affirmatively intended the Submerged Lands Act grant to Alaska to include *all* submerged lands within the new State's boundaries.

III. Because a new State's sovereign ownership of submerged lands under the equal footing doctrine "is an inseparable attribute of the equal sovereignty guaranteed to it on admission," *Louisiana*, 363 U.S. at 16, Congress could not condition Alaska's admission to the Union on the State's relinquishment of its entitlement to those lands. *Coyle v. Smith*, 221 U.S. 559, 566-74 (1911).

IV. Where an international duty or a public exigency necessitates federal retention of submerged lands, the United States' retained interest should be limited to only those rights

absolutely necessary to discharge the duty or deal with the exigency. This would permit the United States to fulfill its national responsibilities while simultaneously fulfilling at least some of the State's submerged lands entitlement. To accommodate both the United States' and Alaska's legitimate interests, the United States' retention of any rights to submerged lands should be limited to the minimum necessary to fulfill the purpose of the withdrawal and reservation.

ARGUMENT

I. The application did not defeat Alaska's submerged lands entitlement under the equal footing doctrine.

Despite acknowledging that at least some of the lands in issue under its exception are subject to the equal footing doctrine, it is not surprising that the United States virtually ignores the more than 150 years of this Court's jurisprudence establishing and applying the constitutional equal footing doctrine. The original thirteen States succeeded to the British Crown's sovereign title to such lands following the revolution. *Martin*, 41 U.S. (16 Pet.) at 410. Title to such lands vests in subsequently admitted States to ensure that they join the Union on an "equal footing" with the original thirteen. *Pollard*, 44 U.S. at 229-30. To implement this equal footing doctrine, the United States holds such lands in a territory "in trust" for future States that might be created out of the territory. *Id.* at 230. The United States has the power under the Property Clause⁴ to convey such lands to third parties prior to statehood, but has never done so under

⁴ U.S. Const. art. IV, § 3, cl. 2.

the general public land laws. *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). Instead, Congress will defeat a new State's title only "in exceptional instances when impelled to particular disposals by some international duty or public exigency." *Holt State Bank*, 270 U.S. at 55.

A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

Montana, 450 U.S. at 552 (citations omitted).

Indeed, in only a single case -- *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970) -- have we concluded that Congress intended to grant sovereign lands to a private party. The holding in *Choctaw Nation*, moreover, rested on the unusual history behind the Indian treaties at issue in that case, and indispensable to the holding was a promise to the Indian Tribe that no part of the reservation would become part of a State. *Choctaw Nation* was thus literally a "singular exception," in which the result depended "on very peculiar circumstances."

Utah, 482 U.S. at 198 (citations omitted).

The Court has never held that Congress may defeat a State's equal footing doctrine title by a pre-statehood federal withdrawal and reservation of lands underlying navigable waters. In *Utah*, the only case where that issue was

presented, the Court specifically declined to reach the issue because, even if a reservation could have that effect, it was not accomplished on those facts. *Id.* at 201. In reaching that determination, however, the Court made clear that the same considerations that apply to a claim that a pre-statehood conveyance defeated State title also apply to a claim that a pre-statehood withdrawal and reservation defeated State title:

[T]he strong presumption is against finding an intent to defeat the State's title. . . . Congress "early adopted and constantly has adhered" to a policy of holding land under navigable waters "for the ultimate benefit of future States." Congress, therefore, will defeat a future State's entitlement to land under navigable waters only "in exceptional instances," and in light of this policy, whether faced with a reservation or a conveyance, we simply cannot infer that Congress intended to defeat a future State's title to land under navigable waters "unless the intention was definitely declared or otherwise made very plain."

....
Given the long-standing policy of holding land under navigable waters for the ultimate benefit of the States, therefore, we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself. Assuming *arguendo* that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land.

Id. at 201-02 (citations omitted).

The pre-statehood actions relied on by the United States here meet none of the criteria established by the Court for finding that Alaska's title to equal footing doctrine lands was defeated.

A. The filing of the application did not reflect an "exceptional instance impelled by an international duty or public exigency."

Congress will defeat a State's equal footing doctrine title only in "exceptional instances when impelled to particular disposals by some international duty or public exigency." *Holt State Bank*, 270 U.S. at 55. At the time Alaska was admitted to the Union, no decision had been made that the lands should be withdrawn and reserved *as a wildlife refuge*. This fact, standing alone, establishes that there was no exceptional instance impelled by some international duty or public exigency that would have caused Congress to deviate from its policy of not defeating State title.

The mere filing of an application did not establish that it would be granted. There were virtually no limitations on the filing of applications. Section 295.9 of Title 43 of the Code of Federal Regulations provided that applications for withdrawals and reservations for virtually any purpose could be filed by "the heads of Federal agencies and instrumentalities and of States and the Territory of Alaska and their political subdivisions or any subordinate officer designated by them." 43 C.F.R. § 295.9 (1958 Supp.). The filing of even frivolous applications triggered an administrative review process. 43 C.F.R. § 295.12 (1958 Supp.). It did not, however, affect the administrative

jurisdiction over the lands and did not change the way in which they were administered. 43 C.F.R. § 295.11(a) (1958 Supp.). The lands were not withdrawn and reserved for the purposes for which the application had been filed until the review process was completed, and then only if the application were granted. 43 C.F.R. § 295.13 (1958 Supp.).

In this case, no change in administration occurred for more than three years after the filing of the application, almost two years after Alaska was admitted to the Union and its submerged lands entitlement under the equal footing doctrine vested.⁵ As a result, the lands were not withdrawn and reserved *as a wildlife refuge* at the time of statehood.⁶ That, in turn, establishes that, at the time of Alaska's admission, there was no exceptional circumstance impelled by an international duty or public exigency which would have caused Congress to defeat Alaska's title (even assuming *arguendo* that a completed withdrawal and reservation *as a refuge* would so qualify, which Alaska denies).

The fact that the application ultimately was granted after Alaska statehood does not change the result. The United States concedes that under its submission Congress would have defeated Alaska's equal footing doctrine title to these lands *whether the application was granted or not*: "If the Secretary had ultimately denied the application, the United States would have continued to own these submerged lands

⁵ The application was filed in November of 1957; Alaska was admitted to statehood in January of 1959; and the application was acted on in December of 1960. Report at 447-50.

⁶ The United States does not contend that the filing of the application resulted in the lands being administered *as a refuge*. It simply notes that, under the administrative regulations, the lands were administered "in accordance with the limitations that apply to wildlife refuges." United States' Brief at 41.

-- just as it had during the territorial period -- unless and until Congress elected to convey them to Alaska." United States' Brief at 46. This would be true even if the application ultimately were denied specifically because there were no exceptional circumstances impelled by an international duty or public exigency.

In other words, Alaska's title would have been defeated whether exceptional circumstances impelled by an international duty or a public exigency existed or not. This Court's decisions preclude this result.

B. The application for withdrawal did not include submerged lands.⁷

Even assuming *arguendo* that the application for withdrawal qualified as an exceptional instance impelled by an international duty or public exigency (and it did not, as shown above), the application did not defeat Alaska's equal footing doctrine title. The Court has established a presumption against the inclusion of lands underlying navigable waters in pre-statehood federal disposals or withdrawals and reservations, and the United States must "establish that Congress clearly intended to include land

⁷ The Master recommends that the Court find that the application included both the tidelands and the submerged lands underlying the coastal lagoons along this portion of Alaska's northern coast. Report at 477-99 and 505. Alaska did not except to this recommendation as the Court has indicated that subsidiary matters "need not be dealt with separately, as they are merged in the ultimate question," *New Mexico v. Texas*, 275 U.S. 279, 286, modified as to other issues, 276 U.S. 557 (1928), and on the "ultimate issue" of title to the disputed lands the Master recommended in Alaska's favor. The United States took this same approach in *United States v. Maine (Massachusetts Boundary Case)*, 475 U.S. 89 (1981). See Reply Brief for the United States (Sept. 1985), *United States v. Maine (Massachusetts Boundary Case)* (No. 35, Original) (Oct. Term, 1985), at 2 n.2.

under navigable waters within the federal reservation." *Utah*, 482 U.S. at 202.

The application and the notice of it given to the public, however, stated that the intent was to withdraw the applied for lands from "all forms of appropriation under the public land laws" except mineral leasing and mining locations. See Report at 447 n.1 (application) and 448 n.2 (public notice). Under the applicable regulation, the filing of the application temporarily segregated the lands from "settlement, location, sale, selection, entry, lease, and other forms of disposal under the public lands laws . . . to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal." 43 C.F.R. § 295.11(a) (1958 Supp.). As the Court noted in *Utah*, lands underlying navigable waters

were *already* exempt from sale, entry, settlement, or occupation under the general land laws. As this Court recognized in *Shively v. Bowlby*, [152 U.S.] at 48, "Congress has never undertaken by general land laws to dispose of" land under navigable waters. See also *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894) (applying *Shively v. Bowlby*, *supra*, to hold that "the general legislation of Congress in respect to public lands does not extend to tide lands"); *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 437 (1892) (holding that "the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters . . . applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea"). Therefore, little purpose would have been served by the reservation of the bed of the [waterbody at issue]."

482 U.S. at 203. This analysis precludes finding that the application included submerged lands, for the United States has failed to show that the submerged lands at issue here were subject to disposal under the public lands laws.

In addition, the public notice described the boundary of the applied for lands in a manner that excluded the submerged lands below the line of extreme low water:

Beginning at the intersection of the International Boundary line between Alaska and Yukon Territory, Canada, with *the line of extreme low water* of the Arctic Ocean in the vicinity of Monument One of said International Boundary line;

Thence westerly *along the said line of extreme low water*, including all offshore bars, reefs, and islands to a point on the Arctic Seacoast known as Brownlow Point

See Report at 449 n.2 (emphasis added).

On its face, this description does not include any submerged lands below the line of extreme low water. It begins "at the line of extreme low water" and proceeds westerly along that line. If it were not for the words "including all offshore bars, reefs, and islands," it is undisputed that the boundary would have followed the sinuositities of the low water line along the mainland. See Volume I of the Transcript ("I Tr.") at 149-50 (testimony of Mr. Hoffman, an expert in surveying and cartography; see also I Tr. at 136-37). Alaska contends that the phrase "including all offshore bars, reefs, and islands" simply includes within the boundary those offshore bars, reefs, and islands that are above the line of extreme low water. The

United States claims and the Master recommends, however, that this phrase establishes as the boundary a single line that runs along the outer edge of the barrier islands and connects the endpoints of the islands, thereby including within the exterior boundary the lands underlying the coastal lagoons.⁸

The parties submitted a wealth of evidence and argument on this boundary description issue. Alaska will not repeat that entire presentation here, and rests its submission on three points. First, at the 1980 trial on this issue, the Chief of the Division of Realty of the Fish and Wildlife Service in the Department of Interior⁹ testified that his predecessor changed the boundary description in the application as initially filed from the line of mean high water to the line of extreme low water, Tr. at 48-50, "to protect the resources that are very significant in the intertidal zone." Tr. at 69. He never suggested that the intent of this change to the boundary description was to establish as the boundary a single line along the outer shore of the islands and connecting their endpoints.

⁸ Ironically, both the United States and the Master deny that the line they advance as the seaward boundary of the applied for lands is Alaska's coast line for Submerged Lands Act purposes, even though the United States' expert on boundary descriptions testified at the 1980 trial on this issue that one standing on the mainland would not be looking at the open sea of the Arctic Ocean but instead at lagoon waters. The Submerged Lands Act defines "coast line" as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c) (emphasis added). Reference to the Master's Figures 9.1 and 9.2, Report facing p. 450, makes clear that the United States' witness was correct and the lagoon waters do not constitute the "open sea" of the Arctic Ocean. If the boundary description of the applied for lands is a single continuous line along the outer shore of the islands and connecting their endpoints, it necessarily is coextensive with Alaska's coast line for Submerged Lands Act purposes.

⁹ See I Tr. at 46.

Second, the United States' expert witness interpreting this description as establishing a boundary along the outer shore of the islands and connecting their endpoints conceded that such a line did *not* follow "the line of extreme low water" but, instead, departed from that line in order to cross bodies of water. 1 Tr. at 182-83 and 185-87. He also conceded that his line "is based on a general impression and interpretation of the language" in the description, *id.* at 187, even though several different lines could be drawn under the criteria he employed and that he would be "the first to admit that some of these lines do have a bit of subjectivity to them, yes." *Id.* at 190. This violates the principle, described by the California Supreme Court, that "the law abhors want of definition in matters of boundary as nature abhors a vacuum." *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 160, 177, 50 P. 277, 283 (1897).

Finally, the United States knew how to write a legal description that, by its terms, included submerged lands within an exterior boundary when that was its intent. For example, Executive Order 3797-A, establishing the National Petroleum Reserve--Alaska, described the seaward boundary of that pre-statehood withdrawal and reservation as the "highest highwater mark on the Arctic coast" and went on to explain that

[t]he coast line to be followed shall be that of the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore, except in the case of Plover Islands . . . where it shall be the highest highwater mark on the outer shore of the islands forming the groups and extending between the most adjacent points of these islands and the sandspits at

either end.

See Report at 345-46 (emphasis added).

The legal descriptions in applications for two other wildlife refuges, moreover, explicitly provided that the boundaries described were single continuous lines along the outer shore of islands and connecting their endpoints, and that the intervening water areas were enclosed within those exterior boundaries. See 19 Fed. Reg. 8076-77 (1954);¹⁰ 20 Fed. Reg. 4227-28 (1955).¹¹ The absence of such language

¹⁰ This application for what eventually became the Izembek refuge (see Public Land Order 2213, 25 Fed. Reg. 12,599-600 (1960)) described a boundary that ran, in part, from

the most northerly point of Cape Glazenap, approximate Lat. 55°16', Long. 168°00'; thence N. 52° 30' E., 1.28 miles across the Cape Glazenap inlet to Izembek Bay, to a point at low-water line of Glen Island, one of the Kudlakof Islands; thence northeasterly with the low-water line of Bering Sea, 4.90 miles to a point on the northerly shore of Glen Island at approximate Lat. 55°19', Long. 162°54'20"; thence No. 35° 15' E., 2.52 miles, across an inlet to Izembek Bay, to a point on the low-water line of Operl Island, one of the Kudlakof Islands; thence northeasterly with the low-water line of Bering Sea, 8.10 miles to the most northerly point of Operl Island at approximate Lat. 55°24'30", Long. 162°42'; thence due east 3.22 miles, across an inlet to Izembek Bay, to a point on the southern shore of Neumann Island; thence northeasterly with the low-water line of Bering Sea, 3.38 miles to the most northeasterly point of Neumann Island, at approximate Lat. 55°26'50", Long. 162°34'50"; thence N. 71° 00' E., 0.22 mile, across an inlet to Moffet Bay, to Moffet Point on the Alaska Peninsula . . . [and] 6.63 miles across Cold Bay

19 Fed. Reg. at 8077. The description concluded by noting that it contained "500 square miles of land together with 183 square miles of open water." *Id.* (emphasis added). (All of that "open water," it should be noted, was enclosed by the islands connected by the straight lines crossing the various inlets.)

¹¹ This application for a Kuskokwim refuge described a boundary that ran, in part, "across the mouth of Hazen Bay," and stated that it included "1,054 square miles of lands and waters." 20 Fed. Reg. at 4228 (emphasis added).

in the application at issue here is strong evidence that the Interior Department did *not* intend a single exterior boundary line along the outer shore of the islands and connecting their endpoints, thereby enclosing the intervening water areas.

In addressing this evidence, the Master unfortunately does not compare the *application* at issue here with the *applications* for the Izembek and Kuskokwim refuges. Instead, he compares the application at issue here only with the Public Land Orders *establishing* the Izembek and Kuskokwim refuges in 1960, *after* statehood, which expressly *excluded* lands subject to the transfer of title to Alaska under the Submerged Lands Act. Report at 493. This exclusionary language reflected the Deputy Interior Solicitor's determination that submerged lands included in applications filed prior to statehood could *not* be included in refuges after statehood because title to these lands had passed to the new State of Alaska under the Submerged Lands Act. Solicitor's Opinion M-36562 (1959) (Ak. Ex. 76). It thus was appropriate in the post-statehood orders establishing the Izembek and Kuskokwim refuges to state explicitly that submerged lands, which had expressly been *included* within the boundaries described in the applications, were explicitly *excluded* from the lands withdrawn in the orders establishing the refuges.

The absence of *exclusionary* language in the order granting the application at issue here simply reflects the absence of *inclusory* language in the application. As the Master notes, one would "expect reasonable consistency in the style of description across different refuges." Report at 491. That is particularly true for the orders establishing these three refuges, for they all were issued on the same day, December 6, 1960. Report at 493. Thus, if there had been any intent to establish a single continuous boundary line in

the application at issue here, as there clearly was in the Izembek and Kuskokwim applications, the same disclaimer language would have appeared in all three orders. The lack of such language in the order granting the application at issue here is strong evidence that it did not describe a single continuous boundary line along the outer shore of the islands and connecting their endpoints.

Under Alaska's interpretation of the boundary description, tidelands -- the lands between the line of extreme low water and the high tide line which the United States concedes are subject to the equal footing doctrine; *see* United States' Brief at 51-53 -- were within the described boundaries. The mere fact that the tidelands lie within these exterior boundaries, however, does not mean that they were *included* so as to defeat Alaska's equal footing doctrine title. "The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the [submerged lands] part of the conveyed land, especially when there is no express reference to the [submerged lands] that might overcome the presumption against its conveyance." *Montana*, 450 U.S. at 554. In *Montana*, although all of the disputed riverbed lands were within the exterior boundaries of an Indian reservation, the treaty creating the reservation did not defeat State title because it "in no way expressly referred to the riverbed, nor was an intention to convey the riverbed expressed in 'clear and especial words' or 'definitively declared or otherwise made very plain.'" *Id.* (citations omitted). The same is true of the application here.

The application's failure to refer explicitly to the tidelands is particularly significant since virtually contemporaneous federal actions explicitly referred to tidelands when that was what was intended. *See* Public Land Order 1749, 23 Fed. Reg. 8623 (1958) (Ak. Ex. 73), which withdrew as the

Simeonof National Wildlife Refuge, *inter alia*, "[a]ll of Simeonof Islands and its tidelands" (emphasis added), and the application for an addition of "[a]ll tidelands . . . adjacent to the Aleutian Islands National Wildlife Refuge" to that refuge. 23 Fed. Reg. 8163 (Ak. Ex. 74) and 9039 (1958). As the Master notes,

the Fish and Wildlife Service in Washington regularly reviewed, and often modified, the boundary descriptions received from its regional offices. One should therefore expect reasonable consistency in the style of descriptions across different refuges.

Report at 491 (citation to Tr. omitted). These pre-statehood federal actions expressly referred to tidelands while the contemporaneous application at issue here does not. The only reasonable inference is that tidelands were *not* included in the latter, for a court must not infer an intent to *include* the tidelands "unless the intention was definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters the stream," the legal equivalent of the tidelands here. *Montana*, 450 U.S. at 552 (quotations and citations omitted).

Also supporting this result are the Public Land Orders establishing the Izembek and Kuskokwim refuges discussed above. Where tide and submerged lands arguably were included in a pre-statehood application, the Interior Department explicitly excluded them from the ensuing withdrawals consistent with the Deputy Interior Solicitor's determination that title to the lands had passed to Alaska under the Submerged Lands Act. The fact that the order granting the application at issue here did not expressly

exclude the tidelands simply reflects the fact that it was not intended to, and did not, *include* tidelands in the applied for lands.

In short, the United States has not established that "Congress clearly intended to include land under navigable waters within the federal reservation" as required by the first prong of the *Utah* test. *Utah*, 482 U.S. at 202. Thus, the filing of the application for withdrawal at issue did not defeat Alaska's submerged lands entitlement under the equal footing doctrine.

C. There is no evidence that Congress affirmatively intended to defeat Alaska's equal footing doctrine title to tidelands within the boundaries described in the application, much less the disputed submerged lands below the line of extreme low water.

The United States points to nothing in the Alaska Statehood Act or its legislative history even intimating that Congress "affirmatively intended to defeat" Alaska's title to equal footing doctrine lands, the second prong of the *Utah* test. *Utah*, 482 U.S. at 202. That is understandable, for the legislative history of the Alaska Statehood Act reveals a congressional intent *not* to *defeat* Alaska's equal footing doctrine title. Instead, the legislative history establishes that Congress intended to *ensure* that Alaska joined the Union on an equal footing with respect to submerged lands title *in fact* as well as in concept.

In hearings on Alaska statehood, both members of Congress and representatives of federal executive branch agencies discussed the equal footing doctrine and its statutory codification in the Alaska Right-of-Way Act of

May 14, 1898, ch. 299, 30 Stat. 409 (formerly codified at 48 U.S.C. § 411; current version primarily codified at 43 U.S.C. §§ 942-1 to 942-9 (1986)). A Justice Department official¹² recommended that no private title be permitted to tidelands because that would be "contrary to the public policy of the United States" and specifically contrary to the 1898 Act which provided that lands underlying navigable waters in the Territory of Alaska "shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Territory." 1954 Senate Hearings at 215-16. Subsequent discussion revealed that both the Committee and the federal officials advising it understood the historical background of the doctrine and that the act admitting Alaska to the Union did not need any specific language to accomplish that result. *Id.* at 223-25.

The Committee adopted the language now appearing in section 1 of the Alaska Statehood Act that describes Alaska as consisting of "all the territory, *together with the territorial waters appurtenant thereto*, now included in the Territory of Alaska . . . to include, if inclusion be necessary, the lands beneath inland navigable waters of the State." 1954 Senate Hearings at 280 (emphasis added). The Committee considered the 1898 Act "a declaration with respect to reservation for a future State of rights in navigable waters," *id.* at 281 (comment by Senator Cordon), and a "reservation for the future State of Alaska by a Federal statute," *Id.* (comment by Senator Daniel). Senator Jackson wrapped up the discussion by making clear his intent, concurred in by the Committee, that Alaska receive title to all the submerged

¹² Ralph Barney was the Chief, Indian Claims Branch, Lands Division, Department of Justice. *Alaska Statehood: Hearings on S. 50 before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 2d Sess. ("1954 Senate Hearings") III (1954).

lands within its boundaries:

Senator JACKSON. May I ask this question? Is there any Federal dominion outside of the geographical boundaries of the Territory of Alaska, outside the geographical boundaries?

....

Senator JACKSON. My only reason for the question is that *I want to make sure that we are in effect conveying everything there is up there [in terms of submerged lands], as far as the overall boundary lines are concerned, to the new State; everything in that area insofar as the geographical boundary lines are concerned.*

Id. at 282 (emphasis added).

The 85th Congress that enacted the Alaska Statehood Act also recognized that the United States held the submerged lands for the benefit of the new State. S. Rep. No. 1720, 85th Cong., 2d Sess. (1958), *reprinted in* 2 1958 U.S. Code Cong. & Admin. News 2893, 2899; S. Rep. No. 1045, 85th Cong., 1st Sess. (1957), *reprinted in* 2 1957 U.S. Code Cong. & Admin. News 1933. It fully understood that "if Alaska goes into statehood [it] would get 100 percent of the navigable waters."¹³ *Hearings before the Subcommittee on*

¹³ The Master concludes that the "100 percent" did not refer to what submerged lands Alaska would receive at statehood but to what the new State's share of royalties would be under the bill being considered. Report at 436 n.75. Only if Alaska received title to the lands upon admission, however, would it receive 100 percent of the royalties. If admitted to statehood, Alaska at that point would have received only the same 37 1/2 percent share of oil and gas revenues from federal lands that other States received under section 35 of the Mineral Leasing Act of 1920, 30 U.S.C. § 191 (1940). In section 28(b) of the Alaska Statehood Act, Congress amended section 35 of the Mineral Leasing Act to provide that Alaska would receive an additional 52 1/2 percent of oil and gas

Territories of the Senate Committee on Interior and Insular Affairs, 85th Cong., 1st Sess. (1957), reprinted in *Alaska Submerged Lands: Hearings on H.R. 8054 before the Senate Committee on Interior and Insular Affairs*, 85th Cong., 2d Sess. 117, 124 (1957).

Finally, Congress expressed considerable displeasure that the beneficial effects of the public lands laws in Alaska had been "vitiated . . . through the creation of tremendous federal reservations." H.R. Rep. No. 624, 85th Cong., 1st Sess. 6 (1957). More than one-fourth of Alaska -- approximately 95 million acres¹⁴ -- was included in those withdrawals and reservations. *Id.* Much of the remaining area "is covered by glaciers, mountains, and worthless tundra." *Id.* The extensive withdrawals "might well embrace a preponderance of the more valuable resources needed by the new State . . . to support itself and its people." *Id.* Although the committee could not make a detailed survey of each one, it was "strongly of the opinion that a considerable number of [them] are either excessive in size or totally unnecessary." *Id.* at 8. Had Congress believed that one or more of these withdrawals included submerged lands *and* that continued federal ownership of those submerged lands justified abandoning its consistent policy of holding the lands for the benefit of a new State, it would have said so but did not.

revenues from lands retained by the United States in recognition of the fact that, unlike the other States, Alaska received no benefits under the Reclamation Act of 1902 into which 52 1/2 percent of federal oil and gas revenues otherwise would be deposited. See H.R. Rep. No. 624, 85th Cong., 1st Sess. 23 (1957). The point, however, is that *only* if Alaska received *title* to the lands at statehood would it receive 100 percent of the royalties.

¹⁴ This is only slightly smaller than the land area of California. See 2 Aaron L. Shalowitz, *Shore and Sea Boundaries* 477 (U.S. Dept. of Commerce Pub. 10-1, 1964) (The total area of California is 158,693 square statute miles. There are 640 acres to a square mile, producing an area expressed in acres of 101,563,520).

All of this legislative history is flatly inconsistent with an affirmative congressional intent to defeat Alaska's equal footing doctrine title to submerged lands. Indeed, it establishes precisely the opposite: Congress affirmatively intended that Alaska take title to *all* submerged lands within its boundaries as an incident of statehood.

In any event, the United States has not established that "Congress affirmatively intended to defeat the future State's title" as required by the second prong of the *Utah* test. *Utah*, 482 U.S. at 202. For this reason, too, the filing of the application for the withdrawal at issue here did not defeat Alaska's submerged lands entitlement under the equal footing doctrine.

II. The application did not defeat Alaska's submerged lands entitlement under the Submerged Lands Act.

A. The principles the Court established in the equal footing doctrine cases apply equally to offshore submerged lands not subject to the doctrine.

In briefing its exception, the United States virtually ignores this Court's equal footing doctrine jurisprudence. Instead, it focuses its argument almost exclusively on the Submerged Lands Act, claiming that the Court should apply as strong a presumption in favor of continued federal ownership of lands subject to the Act as it applies in favor of the States for lands subject to the equal footing doctrine. United States' Brief at 34. It also argues that the Court should view the Submerged Lands Act grant no differently than any other statutory federal grant, and should strictly construe it in favor of the United States. *Id.* at 36. The

United States is wrong on both counts.

Congress intended the same presumption of State ownership to apply to lands granted by the Submerged Lands Act and lands subject to the equal doctrine. The Submerged Lands Act was Congress's direct response to this Court's holding in the 1947 *California* decision, that the equal footing doctrine did *not* apply to offshore submerged lands within State boundaries. "The very purpose of the Submerged Lands Act was to undo the effect of this Court's 1947 decision in *United States v. California*, 332 U.S. 19," *United States v. California*, 436 U.S. 32, 37 (1978) (the "1978 *California* case") -- i.e., to rewrite the law as found by the Court in the 1947 *California* decision and apply the Pollard equal footing doctrine rule of State ownership to offshore submerged lands within State boundaries.

Congress's purpose here was twofold. First, it intended to grant offshore submerged lands within State boundaries to the coastal states. Congress did not intend a merely gratuitous grant, however. Instead, it intended the grant to reflect the law as it had been believed to be prior to the Court's 1947 *California* decision. Second, Congress intended to prevent further erosion of the equal footing doctrine by either the federal executive or this Court. Congress noted that the United States Attorney General had vigorously attacked the rational of this Court's equal footing doctrine cases in the 1947 *California* decision and that the Court had the power to overrule those cases and might well do so if Congress did not prevent it legislatively.

Consequently, Congress sought "to preserve the status quo as it was thought to be prior to the California decision," H.R. Rep. No. 1778, 80th Cong., 2d Sess. 2 (1948), reprinted in 2 1953 U.S. Code Cong. & Admin News 1385,¹⁵

¹⁵ "The legislative history of all the bills considered prior to enactment of the

and "to confirm and establish the rights and claims of the 48 States, long asserted and enjoyed with the approval of the Federal Government, to the lands and resources beneath navigable waters within their boundaries." *Id.* at 3; S. Rep. No. 1592, 80th Cong., 2d Sess. 5 (1948). Before the 1947 *California* decision, this Court's decisions had reflected State ownership of offshore submerged lands, as had decisions of lower federal and State courts and of the Attorneys General of the United States and federal agencies for 160 years; lawyers, legal publicists, and those claiming title under State authority "accepted this principle as the well-settled law of the land." H. R. Rep. No. 1778 at 4; S. Rep. No. 1592 at 5. "[T]he Court by its [1947 *California*] decision not only established the law differently from what eminent jurists, lawyers, and public officials for more than a century had believed it to be, but also differently from what the Supreme Court apparently had believed it to be." H.R. Rep. No. 1778 at 6; S. Rep. No. 1592 at 7.

The committee recognizes that it is within the province of the Supreme Court to define the law as the Court believes it to be at the time of its opinion. However, the Supreme Court does not pass upon the wisdom of the law. That is exclusively within the congressional area of national power. *Congress has the power to change the law, just as the Supreme Court has the power to change its interpretation of the law by overruling pronouncements in*

Submerged Lands Act in 1953 is directly relevant to the latter Act" since the purposes were substantially similar, all prior hearings on predecessor bills were expressly incorporated into the record during hearings on the final bills, and similar references were made on the floor of Congress. *Louisiana*, 363 U.S. at 17 n.16. Some of the following legislative history of the Submerged Lands Act was noted by the Court in that case, *id.* at 18-19 n.17.

its former opinions which have been accepted as the law of the land. Therefore, in full acceptance of what the Supreme Court has now found the law to be, Congress may nevertheless enact such legislation as in its wisdom it deems advisable to solve the problems arising out the decision.

Indeed, the power of the Congress *to establish the law for the future as it was formerly believed to be*, was, in effect, recognized by the Court in the California case

H.R. Rep. No. 1778 at 6 (emphasis added); S. Rep. No. 1592 at 7-8 (emphasis added). As the Court's decision left the status of offshore submerged lands unclear, "Congress should now remove all doubt about the titles by ratifying and confirming the title long asserted by the various States." H.R. Rep. No. 1778 at 8-9; S. Rep. No. 1592 at 10.

The rationale of the so-called [*Pollard*] inland water rule was vigorously attacked by the Attorney General of the United States in the California case. Although he did not ask that it be overruled, he did state that "the tidelands and inland waters rule is believed erroneous."^[16]

The Supreme Court has as much power to overrule its prior decisions laying down the inland-water rule as it had power to change its belief regarding ownership of the

¹⁶ The Deputy Solicitor General representing the United States before the Master in this case shared this view, stating that "alas, our Supreme Court went astray in the 1840's" when it established the equal footing doctrine rule of State ownership in the "dubious" *Pollard* decision. L.F. Claiborne, *Federal-State Offshore Boundary Disputes: The Federal Perspective*, Law of the Sea Eighteenth Annual Conference (1984), reprinted in *The Developing Law of the Oceans* 360-61 (R. Krueger and S. Riesenfeld, eds., 1985).

marginal belt within the boundaries of the States; *and it may well do so in view of its holding in the California case, unless Congress acts to establish the law for the future.*

H.R. Rep. No. 1778 at 12; S. Rep. No. 1592 at 14 (footnote omitted) (emphasis added).

The repeated assertions by our highest Court for a period of more than a century of the doctrine of State ownership of all navigable waters, whether inland or not, and the universal belief that such was the settled law, have for all practical purposes established a principle which the committee believes should *as a matter of policy be recognized and confirmed by Congress as a rule of property law.*

H.R. Rep. No. 1778 at 16 (emphasis added); S. Rep. No. 1592 at 18 (emphasis added).

Here we have the broad question whether Congress should confirm or whether it should reverse the traditional and long-accepted practice that submerged lands within a State's boundary and all resources therein belong in a proprietary sense to the States, subject, of course, to all powers delegated to the United States by the Constitution. This far-reaching historic-policy should be reversed only if the national interest demands reversal. The committee is of the opinion that not only will the public interest be best served by confirming the rights of the States but that common justice and equity require such action.

H.R. Rep. No. 1778 at 17; S. Rep. No. 1592 at 19-20.

Finally, it is the intent and purpose of this bill *to establish the law for the future so that the rights and powers of the States and those holding under State authority may be preserved as they existed prior to the decision of the Supreme Court of the United States in the California case.*

H.R. Rep. No. 1778 at 24 (emphasis added); S. Rep. No. 1592 at 26 (emphasis added).

The transfer of the United States' interest in both lands underlying inland navigable waters and offshore submerged lands in the Act

merely fixes as the law of the land that which, throughout our history prior to the Supreme Court decision in the California case in 1947, was generally believed and accepted to be the law of the land; namely, that the respective States are the sovereign owners of the lands beneath navigable waters within their boundaries and of the natural resources within such lands and waters. Therefore, Title II recognizes, confirms, vests, and establishes in the States title to the submerged lands which they have long claimed, over which they have always exercised all the rights and attributes of ownership.

H.R. Rep. No. 695, 82d Cong., 1st Sess. 5 (1951), *reprinted in* 2 1953 U.S. Code Cong. & Admin. News 1395. The areas to which the Act would confirm the States' rights as "sovereign owners" of submerged lands, of course, included *both* lands beneath navigable inland waters and offshore submerged lands. *Id.*

Congress included both categories of lands within the Act's purview

because they have been possessed, used, and claimed by the States under *the same rule of law*, to wit: That the States own all lands beneath navigable waters within their respective boundaries.

The rule was stated by the Supreme Court in the early case of *Pollard v. Hagan* (3 How. 212, 229 (1845))

The majority opinion in the California case concedes that the Supreme Court in the past has indicated its belief that this Pollard rule of State ownership applies equally to all lands under navigable waters within State boundaries, whether inland or seaward

The purpose of this legislation is to write the law for the future as the Supreme Court believed it to be in the past -- that the States shall own and have proprietary use of all lands under navigable waters within their territorial jurisdiction, whether inland or seaward, subject only to the governmental powers delegated to the United States by the Constitution.

S. Rep. No. 133, 83d Cong., 1st Sess. 7-8 (1953), *reprinted in* 2 1953 U.S. Code Cong. & Admin. News 1474.

Finally, State ownership of all submerged lands within State boundaries was "in the public interest," *id.* at 5; H.R. Rep. No. 215, 83d Cong., 1st Sess. 5 (1953), *reprinted in* 2 1953 U.S. Code Cong. & Admin. News 1385, a principle explicitly embodied in section 3(a) of the Submerged Lands Act, 43 U.S.C. § 1311(a).

Congress thus "embraced" the legal principle that the United States had paramount rights to offshore submerged lands, *United States v. Maine*, 420 U.S. 515, 524 (1975),

only in the sense that it accepted the Court's statement of the law. It did not accept the consequences of the decision, and acted to reverse them by returning the law to what it was thought to be prior to the decision.

The law believed to apply to submerged lands within State boundaries, the law that Congress in the Submerged Lands Act wrote for the future, was the body of law that had emerged from this Court's equal footing doctrine cases. Under that law, as noted above, there is a strong presumption in favor of State title. *Utah*, 482 U.S. at 197-98 and cases cited therein. To effectuate Congress's determination that State ownership of submerged lands both onshore and offshore is in the public interest,¹⁷ its intent that State ownership "be recognized and confirmed by Congress as rule of property law,"¹⁸ and its purpose "to write the law for the future as the Supreme Court believed it to be in the past,"¹⁹ this same presumption in favor of State title must be applied to offshore submerged lands under the Submerged Lands Act grant to the States.²⁰

¹⁷ 43 U.S.C. § 1311(a).

¹⁸ H.R. Rep. No. 1778, 80th Cong., 2d Sess. at 16; S. Rep. No. 1592, 80th Cong., 2d Sess. at 18.

¹⁹ S. Rep. No. 133, 83d Cong., 1st Sess. at 8.

²⁰ The Court in *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 287 (1982), stated that its reading of the Submerged Lands Act in that case "adheres to the principle that federal grants are to be construed strictly in favor of the United States." As is clear on its face, that statement was not essential to the decision. It therefore is *dictum* and "not controlling." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821). In that case, moreover, California sought to quiet title to 184 acres of oceanfront accretions to a Coast Guard facility. A decision in California's favor effectively would have made the Coast Guard a trespasser in going from the fast land to the water, raising the possibility that the Coast Guard might be precluded from discharging its statutory coastal

Thus, in the 1978 *California* case, the Court held that the federal withdrawal and reservation of a one-mile belt of tide and offshore submerged lands (not lands underlying inland navigable waters) around the Anacapa Islands in the Santa Barbara Channel did not defeat California's Submerged Lands Act title to those lands. 436 U.S. at 39-40. The United States relied on a section 5(a) exception to the Act's grant for "any rights the United States has in lands presently and actually occupied by the United States under claim of right."

Id. at 38. The Court held that this "claim of right" exception did not reach the disputed lands because the reservation of the lands did not change the nature of the government's claim, *id.* at 40-41, implicitly rejecting the dissent's argument that the intent of the exception was to reach submerged lands that were "actually occupied." Strictly construing the section 5(a) exception in the 1978 *California* case against the United States and in favor of California was manifestly consistent with Congress's intent, and is the approach that should be followed here as well.

Both the 1978 *California* case and this case call for application of the Court's oft-stated rule that the party claiming the benefit of an exception must establish that the exception applies: "When a proviso like this carves an exception out of the body of a statute or contract, those who set up such exception must prove it." *Clemente Javierre v. Central Altagracia, Inc.*, 217 U.S. 502, 508 (1910) (citations omitted); accord *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967). Any other rule would require the individual States to demonstrate affirmatively

defense, navigational safety, and search and rescue responsibilities. The *dictum* in that case is every bit as much the product of "peculiar circumstances" as was the decision in *Choctaw Nation*. It should be limited to its facts.

that the exceptions to the Submerged Lands Act do *not* apply. "Since as a practical matter it is never easy to prove a negative," *Elkins v. United States*, 364 U.S. 206, 218 (1960), such a rule would impose a heavy burden on the States to disprove a claim by the United States -- whether supported by evidence or not -- that it had "expressly retained" submerged lands at the time the State was admitted to the Union.

The exception in section 5(a) of the Submerged Lands Act on which the United States relies, moreover, is for lands "expressly retained by or ceded to the United States when the State entered the Union." 43 U.S.C. § 1313(a). "In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of words employed." *Flora v. United States*, 357 U.S. 63, 65 (1958). The requirement that lands be "expressly retained" at minimum would seem to require affirmative evidence that an intent to retain "was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land." That is precisely the formulation required for showing an intent to defeat State title under the equal footing doctrine. *Utah*, 482 U.S. at 198.

For these reasons, the Court should not presume that the United States retained title to offshore submerged lands and therefore resolve any doubts in its favor. To effectuate Congress's intent, the Court must apply the same strong presumption in favor of State title under the Submerged Lands Act as it applies to tidelands and lands underlying inland navigable waters under the equal footing doctrine. As the United States has not overcome that presumption, *see* part I *supra*, its exception must be rejected.

B. The application did not defeat Alaska's title even under the United States' statutory analysis.

The United States claims that Congress "expressly retained" the lands subject to the application in section 6(e) of the Alaska Statehood Act within the meaning of the exception to the Submerged Lands Act grant in section 5(a) of the Submerged Lands Act, 43 U.S.C. § 1313(a). This argument mischaracterizes the nature and the legal effect of the application, the function and purpose of section 6(e) of the Alaska Statehood Act, and the language and intent of the Submerged Lands Act section 5(a) exception.

Section 5(a) excepts from the Submerged Lands Act grant to the States, *inter alia*, "all lands expressly retained by . . . the United States when the State entered the Union" The United States contends that the "application had the legal effect of designating 'lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife' for purposes of section 6(e) of the Alaska Statehood Act," and section 6(e) in turn "expressly retained" those lands at the time of statehood within the meaning of section 5(a) of the Submerged Lands Act. United States' Brief at 39.

Section 6(e) of the Alaska Statehood Act provides in pertinent part:

All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law . . . and under the provisions of the Alaska commercial fisheries laws . . . shall be transferred and conveyed to the State of Alaska

by the appropriate Federal agency: . . . *Provided*, that such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife

A mere *application* for a withdrawal for a refuge or reservation neither withdrew nor otherwise set apart any lands *as* a refuge or reservation. As the United States notes, the legal effect of an application was to

temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land law, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

United States' Brief at 41, citing 43 C.F.R. § 295.11(a) (1958 Supp.).

The United States fails to mention the final sentence of that regulation, which states: "Such temporary segregation *shall not affect the administrative jurisdiction over the segregated lands.*" 43 C.F.R. § 295.11(a) (1958 Supp.). Under that provision, the application did not transfer administration of the lands to the applying agency and the lands were *not* withdrawn or otherwise set apart *as* a refuge or reservation within the meaning of section 6(e).

The United States objects to this "formalistic distinction between setting apart land 'as' a refuge, as opposed to 'for the purpose of a refuge.'" United States' Brief at 42. That distinction, however, is central to the proper application of section 6(e). Interior Secretary Chapman proposed the language of section 6(e) in 1950. Report at 465-66 n.17. He

explained that the exception to the transfer of land to Alaska would apply only to "the Pribiloff islands, and over all other Federal lands and waters in Alaska *which have been set aside as wildlife refuges or reservations pursuant to the fur seal and sea otter laws, the migratory bird laws, or other Federal statutes of general application.*" *Id.* at 466 n.17 (emphasis added), quoting Secretary Chapman's April 20, 1950, letter to Senator Mahoney, chairman of the Senate Committee on Interior and Insular Affairs, S. Rep. No. 1929, 81st Cong., 2d Sess. 14 (1950). Congressional reports described the exception as applying only to "lands set apart *as* wildlife refuges or reservations," S. Rep. No. 1163, 85th Cong., 1st Sess. 17 (1957) (emphasis added), to "withdrawn lands *used in general wildlife and fisheries research activities,*" H.R. Rep. No. 624, 85th Cong., 1st Sess. at 19 (emphasis added), to "wildlife refuges," S. Rep. No. 1028, 83d Cong. 2d Sess. at 31, and to "withdrawn wildlife refuges or reservations [and] facilities utilized therewith." H.R. Rep. No. 675, 83d Cong., 1st Sess. 17 (1953). Acting Interior Secretary Chilson interpreted the exception as applying only to "[l]ands *withdrawn or otherwise reserved* for research activities relating to fisheries or wildlife." S. Rep. No. 1163, 85th Cong., 1st Sess. at 33 (emphasis added); H.R. Rep. No. 624, 85th Cong., 1st Sess. at 24 (emphasis added).

Indeed, there is no evidence that Congress even knew that the application at issue here had been filed. The United States erroneously claims that "the Secretary of the Interior informed Congress of the pending application, and he submitted maps showing the area as a federal enclave embracing submerged lands." United States' Brief at 50, *citing* United States' Exhibit ("U.S. Ex.") 61. As the Master explained, however, U.S. Ex. 61 does *not* show the area subject to the application. Instead, it shows a much earlier

completed withdrawal and reservation, Public Land Order 82, Report at 483-84 n.34, which in 1943 withdrew and reserved the entire North Slope of Alaska and reserved the minerals therein "for use in connection with the prosecution of World War II." *Id.* at 452 n.7.

The United States also quotes the Master out of context in claiming that, "[a]s the Master acknowledged, Members of Congress 'might have considered the proviso broad enough to cover lands segregated by a withdrawal application.'" United States' Brief at 50, *citing* Report at 466. The Master said that, "[a]lthough members of Congress after 1952 might have considered the proviso broad enough to cover lands segregated by a withdrawal application, *I have found little evidence in the legislative history that they considered that possibility.*" Report at 466 (emphasis added) (footnote omitted). The Master cited only two references to the proposed refuge for which the application was filed in the legislative history of the Alaska Statehood Act. *Id.* at 466-67 n.18. The first pre-dated the November 1957 filing of the application at issue here, and thus could not have given Congress a basis for considering the applied for lands covered by section 6(e). *Statehood for Alaska: Hearings on H.R. 50 and Other Bills before the Subcommittee on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs*, 85th Cong., 1st Sess. 447 and 482-84 (1957). The second merely indicates that "[s]teps already have been taken to withdraw" the lands subject to the application at issue here, but gives no indication what those steps were and thus also gave Congress no basis for considering the applied for lands covered by section 6(e). Thus, there is in fact *no* evidence from which Congress "might have considered" section 6(e) broad enough to cover the lands covered by *this* application.

Shortly after statehood, moreover, the Deputy Solicitor of Interior addressed a question strikingly similar to that presented here. Solicitor's Opinion M-36562, (1959) (Ak. Ex. 76). A pre-statehood application sought the withdrawal and reservation of tidelands as an addition to the Aleutian Islands National Wildlife Refuge. *Id.* at 2. The Deputy Solicitor concluded that the applied for tidelands "clearly are within the areas to which the Submerged Lands Act of 1953 applies," and that the Act "with certain exceptions not pertinent here" transferred all of the United States' right, title, and interest to the State. *Id.* at 3. He noted that the temporary segregation of lands under the administrative regulations governing such applications was "not equivalent in effect to a Secretarial order [withdrawing the lands]" and, as a result, "the Secretary no longer has the jurisdiction over those areas necessary to effectively withdraw any portion of them for a wildlife refuge or as an addition to an existing one." *Id.* at 2-3. The Deputy Solicitor's contemporaneous administrative construction of an application's legal effect under the regulations on the new State of Alaska's submerged lands entitlement under the Submerged Lands Act is entitled to considerable deference by this Court. *Watt*, 451 U.S. at 272-73.²¹

Because lands subject to an application were not withdrawn or set apart as a refuge within the meaning of section 6(e) of the Alaska Statehood Act, they thus were not

²¹ A later Interior Solicitor "overruled" this 1959 contemporaneous administrative construction of the effect of the application under the regulations on Alaska's submerged lands entitlement in 1978. 86 Interior Dec. 151, 175-76 (1978). As in *Watt*, "[t]he Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference" and, as it did there, the Court should find the new position "wholly unpersuasive." 451 U.S. at 273 (citation omitted).

subject to the section 5(a) exception to the Submerged Lands Act for lands "expressly retained" by the United States at the time of statehood. Senator Cordon explained during the Senate floor debate on the Submerged Lands Act that "[t]he purpose of the ['expressly retained'] language is to reserve to the United States *those facilities and those areas which are used by the Government* in its governmental capacity for one or more of its governmental purposes." 99 Cong. Rec. 2619 (1953) (emphasis added). Lands subject to an application for a withdrawal were not "used" by the United States for the purpose for which the application was filed unless and until the application was granted.

The United States makes an even more fundamental error in relying on section 6(e) of the Statehood Act as an "express retention" of submerged lands under the Submerged Lands Act. Congress included section 6(e) in the Statehood Act to *transfer* property used for fish and wildlife management to Alaska, not to *retain* property:

All real and personal property of the United States situated in the Territory of Alaska *which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law . . . and under the provisions of the Alaska commercial fisheries laws . . .* shall be transferred and conveyed to the State of Alaska by the appropriate Federal agency

(Emphasis added.) Congress only excepted lands "withdrawn or otherwise set apart as refuges or reservations" from this specific grant of property to the new State under section 6(e) -- "*such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations,*"

Id. (emphasis added) -- and *not* from the grant of submerged lands to Alaska under section 6(m), which applied the Submerged Lands Act to the new State.

Congress "expressly retained" no submerged lands in the Alaska Statehood Act. The United States cites nothing in the Act or its legislative history even intimating a congressional intent to retain some of the submerged lands that otherwise would be transferred to the new State under the Submerged Lands Act, much less "expressly" articulating such an intent. Indeed, the legislative history clearly indicates that Congress affirmatively intended all submerged lands in Alaska, including those offshore, to go to the new State upon admission. The Alaska Right-of-Way Act provided in part that title to the beds of navigable waters within the Territory of Alaska "shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said [Territory]" and defined the term "navigable waters" as including "all tidal waters up to the line of ordinary high tide." 30 Stat. at 409. Senator Daniel noted that Congress had used this Act in discussions on the Submerged Lands Act to show "that Congress recognized the States should own such lands," that they had been reserved by Congress in 1898 for the future State of Alaska, and that the 1898 reservation included "lands covered by territorial waters." 1954 Senate Hearings at 281.

This is not to say that Congress did not consider imposing some limitations on the new State of Alaska's Submerged Lands Act grant. A Senate Committee adopted a proviso to the section applying the Submerged Lands Act to Alaska that would have required the new State to permit timber companies to use surface waters for timber operations in the Tongass National Forest in Southeast Alaska. See S. Rep. No. 1163, 85th Cong., 1st Sess. 20 (1957). Even that limited

proposed "retention," however, one which addressed only the water *surface* and *not* the submerged *lands*, was not included in the Alaska Statehood Act as enacted.

Accordingly, purely as a matter of statutory construction, the Master's determination that the application did not defeat Alaska's submerged lands entitlement under the Submerged Lands Act was correct.

III. Congress could not condition Alaska's admission to the Union on the State's relinquishment of its entitlement to equal footing doctrine lands.

The United States' argument that Congress demonstrated an intent to defeat the State's title to the submerged lands at issue through a provision of the Alaska Statehood Act is based on the unconstitutional premise that Congress can retain sovereign equal footing doctrine lands as a condition of statehood. The equal footing doctrine prohibits the United States' retention of submerged lands in a statehood act.

As the State argued in its opening brief, this Court has long considered provisions of a statehood act that purport to condition the new State's admission to the Union on a retention by the United States of a part of the new State's sovereignty to violate the equal footing doctrine, *see* Alaska's Brief at 66-70, and Alaska will not repeat that entire discussion here. The point, however, applies equally to the equal footing doctrine lands at issue here.

In brief, the Court held in *Pollard* that a state's title to lands underlying navigable waters is conferred by the Constitution, and thus Congress cannot retain title as a condition of statehood. 44 U.S. at 229 ("no compact that might be made between [Alabama] and the United States could diminish or enlarge these rights"); *see also* the Court's

discussion of *Pollard* in *Corvallis Sand & Gravel*, 429 U.S. at 374 ("[t]he Court established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party [after statehood] was capable of defeating." (footnote omitted)). The Court reaffirmed and extended this rule in *Coyle*, 221 U.S. 559, holding that a limitation on Oklahoma's sovereign power to determine the location of its capital imposed in the statehood act as a condition of admission was invalid because the Constitution requires that all new states be admitted with all the powers of sovereignty and jurisdiction that pertain to the original states. *Id.* at 566-74.

The United States' retention of lands underlying navigable waters as a condition of statehood of necessity would require that the State enter the Union on less than equal footing. Assuming for the sake of argument that section 6(e) of the Alaska Statehood Act demonstrated an affirmative Congressional intent to defeat Alaska's title to equal footing doctrine lands, and it did not, it would constitute an unconstitutional condition to statehood that would be void.

IV. Finally, when an international duty or a public exigency necessitates federal retention of submerged lands, the United States' retained interest should be limited to only those rights absolutely necessary rather than fee title.

The State argued in its opening brief that in any case where an international duty or a public exigency necessitates federal retention of submerged lands, the United States' retained interest should be limited to only those rights absolutely necessary to discharge the duty or deal with the

exigency, Alaska's Brief at 70-71, and will not repeat that discussion here. As with the argument made in part III *supra*, however, the point applies equally here. In brief, limiting the United States' retained interest to only those rights absolutely necessary to discharge an international duty or deal with a public exigency permits the United States to fulfill its national responsibilities while simultaneously fulfilling at least some of the State's submerged lands entitlement.

As applied here, assuming that the application retained submerged lands for the protection of wildlife within the meaning of section 6(e) of the Alaska Statehood Act (which Alaska disputes), the rights retained by the United States would at minimum not include the subsurface interests. The United States has already determined that these interests are not essential to wildlife protection purposes in northeast Alaska. Indeed, in 1983 the Department of the Interior traded 92,160 acres of subsurface oil and gas rights within the Arctic National Wildlife Refuge ("ANWR") to the Arctic Slope Regional Corporation, a for-profit Alaska Native corporation organized under the Alaska Native Claims Settlement Act,²² and permitted the corporation to drill exploratory wells within the ANWR lands. H.R. Rep. No. 104-8, 104th Cong., 1st Sess. 35 (1995).

To accommodate both the United States' and Alaska's legitimate interests, the United States' retention of any rights to submerged lands should be limited to the minimum necessary to fulfill the purpose of the withdrawal and reservation.

²² Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601 *et seq.* (1996)).

CONCLUSION

The Court should accept the Master's recommendation that the pre-statehood application for withdrawal and reservation of a wildlife refuge in northeast Alaska, not acted on until long after Alaska's admission to the Union and the vesting of its submerged lands entitlement, did not defeat Alaska's title to those lands.

October 1996

Respectfully submitted,

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IN THE
Supreme Court Of The United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF ALASKA

On The Report Of The Special Master

**BRIEF OF THE WILDERNESS SOCIETY, SIERRA CLUB,
ALASKA WILDERNESS LEAGUE, NATIONAL AUDUBON
SOCIETY, PORCUPINE CARIBOU MANAGEMENT
BOARD, ALASKA CENTER FOR THE ENVIRONMENT,
NORTHERN ALASKA ENVIRONMENTAL CENTER AND
TRUSTEES FOR ALASKA AS *AMICUS CURIAE*
IN SUPPORT OF THE UNITED STATES OF AMERICA**

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IN THE
Supreme Court Of The United States

OCTOBER TERM, 1996

No. 84, Original

UNITED STATES OF AMERICA, *Plaintiff,*

v.

STATE OF ALASKA

On The Report Of The Special Master

**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

This case represents far more than a dispute between the United States and Alaska over who holds title to certain lands on Alaska's northern coast. Resolution of the issues before the Court will determine whether the last remaining intact Arctic ecosystem is preserved or is reduced to an industrialized landscape.

To bring to the Court's attention the impacts of its decision in this case, and exactly how those impacts relate to the legal arguments presented to the Court by the parties, seven non-profit environmental organizations and the Porcupine Caribou Management Board request leave to submit for the Court's consideration the attached Brief of *Amicus Curiae*. Since long before its establishment, movants have been vocal advocates for the Arctic Wildlife Range and the protection of the integrity of the Range -- now National Wildlife Refuge. These issues are central to questions

presented to the Court in this case, primarily to Question #10 concerning whether the boundary of the Range includes the disputed lands. Movants thus have an informed perspective and seek to "to bring[] to the attention of the Court relevant matter not already brought to its attention by the parties . . ." Supreme Court Rule 37.1.¹

As an initial matter, movants did not file a brief earlier in these proceedings as it did not appear from the original briefs on exceptions that the State of Alaska was going to take exception to the Special Master's recommendation on Question #10. See Brief for the State of Alaska in Support of its Exceptions at 5 n.4 (filed August 1996). This question was first excepted to by the State in its Reply Brief. See Alaska Reply Brief at 16 (filed October 1996). Thus, this is the first opportunity for movants to submit information to the Court on the primary question for which they have special expertise. See Supreme Court Rule 37.1 (an *amicus* brief which does not "bring to the attention of the Court relevant matter . . . burdens the Court, and its filing is not favored").

Movants' special expertise on the issues raised in this case concerning the Arctic National Wildlife Refuge is well documented and began long before the Range was established. In fact, as the Special Master notes, Olaus J. Murie, then-director of movants The Wilderness Society, was "the principal conservationist behind the Arctic Wildlife Range." Report of the Special Master (Report) at 486; see

¹The United States of America consented to the filing of the attached *Amicus Curiae* brief. The written consent has been filed with the Clerk pursuant to Supreme Court Rule 37.3. The State of Alaska, however, did not consent. Thus, pursuant to Supreme Court Rule 37.3(b), movants submit this Motion for Leave to File *Amicus Curiae* Brief.

also William O. Douglas, *My Wilderness* at 10 (1960) (discussing early 1950's scientific expedition into the Arctic with Olaus Murie); Debbie S. Miller, *Midnight Wilderness* 163-65 (1990) (discussing The Wilderness Society's role in establishment of the Arctic Wildlife Range).

The Sierra Club also played a central role in the establishment of the Range. In 1957, eight months before the federal Bureau of Sport Fisheries and Wildlife submitted its application for establishment of the Range to the Interior Department, see Report at 447 n.1, the Sierra Club sponsored a conference on, among other things, a "proposed arctic reserve." *Midnight Wilderness* at 172. As a result of meetings held at that Sierra Club conference between federal land-use agency representatives and conservationists, it was decided that "a proposed Arctic National Wildlife Range, under [United States Fish & Wildlife Service] administration" would be sought. *Id.* This is exactly what came to pass. See Report at 450 n.3 (quoting Public Land Order 2214 establishing Arctic National Wildlife Range, 25 Fed. Reg. 12,598 (1960)).

As detailed in the Brief of *Amicus Curiae*, a primary reason for the establishment of the Range was the protection of its incredible wildlife, including the internationally-important Porcupine Caribou Herd. Movant Porcupine Caribou Management Board is a joint Canadian and Native organization which has worked for over a decade to promote the conservation and protection of the Porcupine Caribou Herd and its habitat. In performing this function, the Board draws on the centuries-old expertise of its members concerning the caribou and the varied habitat upon which it depends.

All movants have long-standing records of participation in issues concerning the Arctic Wildlife Range,

now Refuge. For example, The Wilderness Society, Sierra Club, National Audubon Society, Alaska Center for the Environment, Northern Alaska Environmental Center and Trustees for Alaska all have been involved in extensive litigation concerning proposals to drill for oil in and near the Arctic National Wildlife Refuge and the impacts of such drilling on the environment and the Refuge. See, e.g., *Trustees for Alaska, et al. v. Hodel*, 806 F.2d 1378 (9th Cir. 1986) (concerning environmental impacts of drilling in Refuge); *Natural Resources Defense Council, et al. v. Lujan*, 768 F. Supp. 870 (D.D.C. 1991) (same); *Trustees for Alaska, et al. v. State*, 865 P.2d 745 (Alaska 1993) (impacts to environment, including the Refuge, of state oil and gas lease sale immediately offshore of the Refuge at Demarcation Point); *Trustees for Alaska, et al. v. State*, 851 P.2d 1340 (Alaska 1993) (impacts to the environment, including the Refuge, of state oil and gas lease sale immediately offshore of the Refuge in Camden Bay); *Trustees for Alaska, et al. v. State*, 795 P.2d 805 (Alaska 1990) (same).

Finally, movants, including those mentioned above and the Alaska Wilderness League, have been principal players in the debate concerning whether drilling should occur in the Arctic National Wildlife Range. See, e.g., Jimmy Carter, *Save Alaska -- Again*, N.Y. Times, May 18, 1995, Op-ed (former President Jimmy Carter is the Honorary Chair of the Alaska Wilderness League).

The special expertise movants have developed over the years relates directly to the Court's consideration of whether the boundary of the Refuge is a "single continuous line, following the seaward side of offshore bars, reefs, and islands and, where it meets rivers, crossing such rivers at their mouths" as the Special Master recommends, Report at 495, or whether it follows the "sinuosities of the extreme low

water line along the mainland" including within the boundary only those "offshore bars, reefs, and islands that are above the line of extreme low water," as Alaska would have the Court decide. Reply Brief for the State of Alaska at 18. This is so because a primary reason movants advocated for establishment of the Range, and have fought so hard to protect it from drilling, was to ensure the continued existence of the incredible wildlife found within its area. As those who established the Range knew, and as detailed in the attached Brief, the disputed lands--the coastal lagoons and lands underlying navigable waters--are absolutely essential habitat for this wildlife and thus for the purposes for which the land was originally set aside as a Wildlife Range.²

Consequently, the Court should grant this Motion for Leave to File *Amicus Curiae* Brief.

Respectfully submitted,

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November 12, 1996

²Less directly, these same points are relevant to the Court's consideration of Question #9; whether the application for withdrawal and creation of the Arctic Wildlife Range effectively withheld from Alaska the disputed lands. *Movants* touch only briefly on this point.

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IN THE
Supreme Court Of The United States

OCTOBER TERM, 1996

No. 84, Original

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STATE OF ALASKA

On The Report Of The Special Master

**INTRODUCTION AND INTEREST OF
AMICI CURIAE**

No place in America, and perhaps the world, rivals the Arctic National Wildlife Refuge for its combination of awesome scenic beauty and its critical biological importance to the millions of animals who migrate through and across its landforms. This one place forms the locus of a web of life whose strands reach quite literally around the planet. It is a primeval wilderness of unparalleled vastness and abundance.

The Arctic has a strange stillness that no other wilderness knows. It has loneliness too -- a feeling of isolation and remoteness born of vast spaces, the rolling tundra, and the barren domes of limestone mountains. This is a loneliness that is joyous and exhilarating. All the noises of civilization have been left behind; now the music of the wilderness can be heard. The Arctic shows beauty in this barrenness and in the shadows cast by clouds over empty land. The beauty is in part the glory of seeing moose, caribou

and wolves living in natural habitat, untouched by civilization. It is the thrill of seeing birds come thousands of miles to nest and raise their young.

...

The Arctic has a call that is compelling. The distant mountains make one want to go on and on over the next ridge and over the one beyond. The call is that of a wilderness known only to a few. This is not a place to possess like the plateaus of Wyoming or the valleys of Arizona; it is one to behold with wonderment. It is a domain for any restless soul who yearns to discover the startling beauties of creation in a place of quiet and solitude where life exists without molestation by man.

William O. Douglas, *My Wilderness* 9-10 (1960).

The Arctic Refuge and its wild inhabitants, until now having avoided the encroachment of industrial development, are in great jeopardy. The State of Alaska plans to move forward with oil exploration within or on the edge of the Refuge if its claim to submerged lands in this case is granted. Those plans endanger the wilderness and wildlife of the Refuge, including the spectacular Porcupine Caribou Herd. The Refuge and its submerged lands so critical to wildlife belong to the American people and must be protected as a part of our great national heritage.

This brief is submitted on behalf of organizations whose collective mission is to protect nature from the most serious threats it faces. The instant litigation is a thin veil holding in abeyance what is undoubtedly the greatest single threat now facing this last vestige of America's wild lands. On behalf of more than one million Americans who have

joined together in defense of the national heritage, the named organizations submit this brief as *amici curiae* in support of the United States. A fuller statement of *amici's* interest is found in the accompanying Motion for Leave to File *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

1. The Arctic National Wildlife Refuge is a unique area of unparalleled value to the American public. Its nearshore and offshore disputed lands are central to the continued healthy functioning of the Refuge and to the values the United States intended to preserve when it retained the area, which include wildlife, recreation and wilderness. Federal ownership of the lands is necessary to protect that national public interest and fulfill the very purposes for which the lands were retained.
2. Ownership of the disputed lands by the State of Alaska and concomitant oil exploration activities would impair the wildlife, wilderness, and recreation values which the United States sought to protect in creating the Refuge.
3. The Range boundary drawn by the United States reflected consideration of the national values embodied in the area and included the disputed lands. To protect the national interest in these lands and serve the purposes of their inclusion within the Refuge, the grant of lands to Alaska at statehood must be interpreted to exclude the disputed lands.

ARGUMENT

A. The Unique National Values of the Arctic National Wildlife Refuge Would Be Severely Threatened By Conveyance of Submerged Lands to the State.

1. The Arctic National Wildlife Refuge and Its Nearshore Waters Are an Integrated Ecosystem of Tremendous National Significance.

Explorers have been leading expeditions to the Arctic coast since the 1920s. Findlay, *History and Status of the Arctic National Wildlife Range*, 6 U.B.C. L. Rev. 15 (1971). Renowned scientists and conservation leaders such as Olaus and Mardy Murie, A. Starker Leopold, Robert Marshall and Justice William O. Douglas visited the area and returned with glowing reports of its biological diversity and outstanding scenery.¹ As news of the incredible beauty and diverse wildlife in this portion of the Arctic spread, a movement arose to preserve the unique natural values of the area.

In 1957, the groundswell of public support for preserving a large block of the public lands in northeastern Alaska culminated in the Bureau of Sport Fisheries and Wildlife's application to the Secretary of Interior for an order withdrawing 8.9 million acres of land "to establish an Arctic Wildlife Range . . . for the preservation of the wildlife and

¹ See, e.g., *id.*; William O. Douglas, *My Wilderness* 9-31 (1960); Penny Rennick, ed., *Arctic National Wildlife Refuge*, Alaska Geographic, Vol. 20, No. 3 (1993); Debbie S. Miller, *Midnight Wilderness* 161-81 (1990); George Collins, *Background Information For Use In Connection With A Proposal For An International Wildlife Range*, 6 U.B.C. L. Rev. 3, 9 (1971).

wilderness resources of that region." Report of the Special Master [hereinafter Report] at 447 n.1, *quoting* Application for withdrawal by public land order, November 18, 1957, *see also* 23 Fed. Reg. 364 (1958) (public notice of application). In 1960, the Secretary issued Public Land Order 2214, withdrawing the land and establishing the Arctic Wildlife Range. 25 Fed. Reg. 12,598 (1960). In a statement of justification for the Range, dated November 7, 1957, D.H. Janzen, director of the Bureau of Sport Fisheries and Wildlife, stated:

The portion of the Arctic plain included in the proposal is a major habitat, particularly in summer, for the great herds of Arctic caribou, and the countless lakes, ponds and marshes found here are nesting grounds for migratory waterfowl . . .

The river bottoms with their willow thickets furnish habitat for moose. This section of the seacoast provides habitat for polar bears, Arctic foxes, seals, and whales . . .

This unmodified region is important for game management research, particularly on caribou range problems.

The proposed Arctic Wildlife Range offers an ideal opportunity, and the only one in Alaska, to preserve an undisturbed portion of the Arctic large enough to be biologically self-sufficient. It would comprise one of the most magnificent wildlife and wilderness areas in North America . . .

U.S. Ex. 9.

In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA) which, among other things, enlarged the Range to 19 million acres and changed its name to the Arctic National Wildlife Refuge. 16 U.S.C. § 688dd. In ANILCA, Congress also designated all but 1.5 million acres of the original Range as Wilderness. 16 U.S.C. § 1132. The remaining 1.5 million acres, located along the coastal plain, were "withdrawn from all forms of entry or appropriation under the mining laws, and from operation of the mineral leasing laws." 16 U.S.C. § 3142(i). Importantly, Congress also provided in ANILCA that:

Production of oil and gas from the Arctic National Wildlife Refuge is prohibited and no leasing or other development leading to production of oil and gas from the range shall be undertaken until authorized by an Act of Congress.

16 U.S.C. § 3143. Congress has not authorized any such development.²

Protection of this area by Congress is not surprising. No other park or preserve can match the primitive and intact ecosystem of the Arctic Refuge. Not Yellowstone with its edgy diversity of megafauna, not the Everglades with its enormous biological productivity, not the Grand Canyon with its still-life splendor. Indeed, the Refuge "is one of the more primitive and isolated wild land regions *left on earth* that has been afforded protection as a conservation area."³

² Of the 1,100 miles of Alaskan shoreline along the Beaufort and Chukchi Seas, only the approximately 150 miles of Arctic Refuge coastline remains off-limits to oil and other mineral development.

³ U.S. Fish and Wildlife Service, Arctic National Wildlife Refuge, Coastal Plain Resource Assessment--Final Report: Baseline Study of the Fish,

The perennially snow-capped, 9,000-foot peaks of the Brooks Range bisect the Refuge from east to west. Their northern slopes meld into a fifteen to forty mile wide coastal plain which leads to the island-studded coast of the Beaufort Sea. The mountains produce snow melt during virtually the entire spring and summer, so much so that eighteen major rivers flow from the Brooks Range to the Beaufort Sea. The coastal plain is tundra, with shin-high communities of mosses, lichens, dwarf shrubs, berry plants and wildflowers. There are no trees on the coastal plain; none can endure the winter's cold or months-long darkness. The tundra is underlain by permafrost only a few feet down, so that surface water does not percolate, but instead flows gently through the tussocks toward the Beaufort Sea.

Wildlife is ubiquitous during the summer. Meandering across the tundra are customarily found thousands of caribou. See App. 1 (photograph of Porcupine Caribou Herd). The world-renowned Porcupine Caribou Herd, 152,000 strong, migrates approximately 2,700 miles annually. Every April, the Herd begins its long walk to the coast, where the blooming tundra provides a high-calorie, high-protein source of nutrition that is particularly essential to cows during the early-summer calving season. The caribou's chief antagonist is the mosquito, billions of which virtually explode from the moist earth every June and whose prime source of food is the caribou. Because this represents a serious health threat, the caribou go to great lengths to deflect the insect assault. Their chief defense against the mosquito is to seek coastal waters. Near-complete submersion in seawater is the best defense. This makes the

Wildlife, and Their Habitats, vol. II, 481 (1986) (emphasis added) [hereinafter Baseline Study].

lagoons and barrier islands the "insect relief habitat" of choice. *See infra* p.14; App. 2 (map).

Other wildlife species that are found in great abundance include muskoxen, grizzly bears, wolves and Arctic foxes. Wolverine, marmot, voles, lemmings, weasels, and dozens of other mammal species join the tapestry of wildlife that make the coastal plain the most highly valued wildlife preserve on the continent.

The Coastline and Beaufort Sea Lagoons

The Arctic National Wildlife Refuge is the nation's only conservation area that protects a complete spectrum of Arctic ecosystems. From the high peaks of the Brooks Range and foothills, the coastal plain sweeps down to the coastal lagoons fringed by barrier islands at the Beaufort Sea coast. The lagoons are an integral part of this ecosystem. From its early beginnings, the Refuge was established "out of a concern for the wilderness ecosystem of northern Alaska as a whole." U.S. Fish and Wildlife Service, Final Arctic National Wildlife Refuge Comprehensive Conservation Plan, EIS, Wilderness Review, and Wild River Plans 49 (1988). During a visit to the coastal plain in the early 1950s George Collins, a government researcher and surveyor, found "a magnificent place of beauty . . . that comes largely from being part of a much larger, varied and interconnected natural system." U.S. Fish and Wildlife Service, A Preliminary Review of the Arctic National Wildlife Refuge, Alaska Coastal Plain Resource Assessment: Report and Recommendation to the Congress of the United States and Final Legislative Environmental Impact Statement 7 (1995) [hereinafter FWS 1995 Report].

The Refuge's coastal plain, including its intricate system of lagoons, is the "most biologically productive part of the refuge and the heart of wildlife activity." *Id.* at 19. This biological richness is due to a unique proximity of the mountains to the coast and a greater landscape diversity than any other part of Alaska's coastal plain.

The coastal lagoons are an essential part of a broader web of life of the Refuge's coastal plain. One of the most important values of the lagoon habitat is the respite from mosquitoes it provides for the Porcupine Caribou Herd. Polar bears regularly den in such places as the Pokok Lagoon bluffs, Camden Bay area, and Canning River delta lagoons. U.S. Department of Interior, Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource Assessment, Report and Recommendation to Congress and Final Legislative Environmental Impact Statement 30, Plate 1E (1987) [hereinafter FLEIS]. "The brackish lagoons provide migratory corridors for anadromous fish and are extremely important feeding areas for these species," such as Arctic Char and Arctic Cisco. FLEIS at 34. In the lagoons the submerged floor creates a highly-textured, gravelly or rocky surface that supports tremendously active communities of algae, kelp, and invertebrates such as chitons, anemones, and sponges which provide the foundation for the food chain. K.H. Dunton, *An Annual Carbon Budget for an Arctic Kelp Community*, The Alaskan Beaufort Sea 311-25 (P. Barnes, et al. eds., 1984). Clouds of migratory birds come to the lagoons to feast on concentrations of fish found there, and

remove the energy embodied in the lagoons to distant parts of the world.⁴

This far above the Arctic Circle, the sun shines constantly in the short summer and not at all in the winter. The twelve months of life in the Refuge that therefore must be lived in only four months result in an explosion of biological activity—in the lagoons and among the mosses, lichens, and wildflowers of the coastal plain. The products of this explosion are so valuable, ecologically speaking, that species have evolved with the ability and determination to travel whatever distance is necessary to partake of the riches, and to convey them elsewhere.

⁴M. Spindler, U.S. Fish and Wildlife Service, Bird Populations in Coastal Habitats, Arctic National Wildlife Range, Alaska 25 (1979) [hereinafter Bird Populations]. U.S. Ex. 54. One hundred and thirty-five species of waterbirds have been recorded on the Arctic Refuge's coastal plain. T. Kizzia, *Confrontation in the North*, Defenders, Sept./Oct 1987, at 18 [hereinafter *Confrontation in the North*]. The most impressive migration is undertaken by the Arctic Tern, which travels 10,000 miles from the Antarctic. Honorable mentions go to the Northern Wheatear, which migrates from southern Africa; Pectoral Sandpipers and Red Phalaropes (South America); Dunlin (Asia and California); and Brant (Mexico). The most numerous species include the Red-throated and Arctic Loons, Oldsquaw and Common Eider ducks. Of the several million birds that inhabit the Arctic Refuge for some period of the year, the vast bulk occupy the lands and waters in the vicinity of the Beaufort Sea lagoons. U.S. Ex. 44; U.S. Ex. 54.

2. The National Values of the Arctic National Wildlife Refuge Are Threatened By Conveyance to the State.

The State of Alaska has unequivocally declared its intent to lease the valuable nearshore submerged lands at issue here for oil and gas exploration and development as soon as 1999 if it prevails in its claim in this case.⁵ If this Court allows the State's claim to nearshore lands, oil exploration and development will cause severe and irreparable harm to the integrity of the Arctic National Wildlife Refuge.

a. Extensive Oil Exploration, Development and Production Activities Will Occur.

Exploration activities associated with drilling the submerged lands of the Refuge will include extensive surveys, likely to be conducted by helicopter or on the ice during winter, and seismic exploration. See, e.g., FLEIS at 83. Then, large scale exploratory drilling would occur. *Id.* at 84.

Development and production activities are even more invasive and extensive than exploration activities. Major

⁵See State of Alaska, Division of Oil and Gas, Five Year Oil and Gas Leasing Program, Beaufort Sea Areawide Lease Sales 1999, 2000, 2001 (July 1996) (sales include disputed submerged lands); David Whitney, *Alaska Counts On Court*, Anchorage Daily News, April 26, 1996, at A-1 (Alaska Attorney General states that the Special Master's finding concerning the Refuge, "if upheld . . . would allow the state to let oil companies lease near the edge of the [R]efuge's coastal plain"). See also *Trustees for Alaska, et al. v. State of Alaska, Department of Natural Resources*, 865 P.2d 745, 751 n.8 (Alaska 1993) (Demarcation Point) (noting industry interest in drilling the Refuge).

projects associated with production of oil on Alaska's North Slope include:

central production facilities, drilling pads, roads, airstrips, pipelines, water and gravel sources, base camps, construction camps, storage pads, powerlines, powerplants, support facilities and possibly a coastal marine facility.

FLEIS at 87; *see also* Final Finding and Decision of the Director, State of Alaska Oil and Gas Lease Sale 50 (Camden Bay) at 52-54, 56 (April 30, 1987) [hereinafter Alaska Offshore Oil Decision]. Exploratory and development drilling could be conducted in the lagoons themselves. *See* Alaska Offshore Oil Decision at 49-50. This drilling would occur over one or more seasons, and entails construction of roads and airstrips, often made with ice, and possibly artificial gravel islands. *See id.* at 49-53; FLEIS at 84.

If successful in its claim, the State of Alaska may seek to invoke Title XI of the Alaska National Interest Lands Conservation Act to gain access to its land across the Refuge. 16 U.S.C. § 3170(b). If Title XI access is obtained, the actual reach of development would extend beyond the submerged lands and include roads and other transportation systems, pipelines and other infrastructure on the coastal plain of the Refuge, spanning the area from development sites in the lagoons to the existing transportation systems to the west at Prudhoe Bay.

Exploration, development, and production phases generate significant amounts of wastes. For example, drilling activities typically result in the discharge of an average of 14,000 barrels of drilling fluids and cuttings per

well in Cook Inlet, Alaska. *See* 60 Fed. Reg. 9,428, 9,440 (1995). The United States Environmental Protection Agency has recognized that drilling wastes pose real threats to the marine and aquatic environments:

Discharged drilling fluids and drill cuttings are shown to cause contamination of sediments with heavy metals and hydrocarbons up to 4000 meters from the platforms. . . . Produced water discharges are shown to cause contamination of sediments with metals and . . . hydrocarbons up to 1000 meters from the platforms.

58 Fed. Reg. 12,454, 12,493 (1993) (EPA offshore oil and gas effluent rule). Traditionally, offshore and coastal area drilling rigs in Alaska have discharged these wastes directly into the surrounding waters. *See, e.g., id.*; *see also* Alaska Offshore Oil Decision at 55-56.

**b. The Arctic National Wildlife Refuge
Holds Extraordinary Wildlife,
Wilderness, and Recreation Values
Which Will Be Harmed By Oil
Exploration and Development.**

The wildlife resources, wilderness values and recreational opportunities of the last remaining intact ecosystem on America's Arctic coast are unique and irreplaceable. All of these facets of the Arctic National Wildlife Refuge face severe threats from oil exploration, development and production activities.

Wildlife

Focusing first on the most visible wildlife presence in the coastal area, oil development of submerged lands would

threaten the vast, internationally significant Porcupine Caribou Herd. The coastal plain and lagoons, barrier islands and river deltas provide critical habitat for the highly migratory Herd. FLEIS at 25. During calving on the coastal plain, "[a]dult females are at the lowest ebb of their physical condition" and "no alternative habitats are apparently available." International Porcupine Caribou Management Board, Sensitive Habitats Of The Porcupine Caribou Herd 14 (January 1993) [hereinafter Sensitive Habitats]. During the post-calving period the Porcupine Caribou aggregate in large numbers on the coastal plain, and in particular in the lagoons and on barrier islands seeking relief from the insects which continually harass the caribou. FLEIS at 25; Sensitive Habitats at 17; *see also* Apps. 1 & 2.

One need only envision a drill rig and associated facilities in or near the Beaufort lagoons to understand that this habitat would be significantly degraded such that the Porcupine Caribou, which now use the area by the thousands, would be adversely affected. *See* App. 1. During the post-calving period "[f]ree movement of these large groups is critical [and] [c]ow/calf groups are relatively intolerant to disturbance." Sensitive Habitats at 17. "[I]f caribou are delayed or prevented from free access to insect-relief habitat, the result may be deterioration in body condition with consequences of decreased growth, increased winter mortality, and lowered herd productivity." FLEIS at 22.

Oil development activities in or near caribou habitat can adversely affect caribou. *See* FLEIS at 120 (noting three kilometer "sphere of influence" on caribou from industrialized areas). This fact has been amply demonstrated with the Central Arctic Caribou Herd which inhabits land

around oil development facilities at Prudhoe Bay, located on Alaska's North Slope to the west of the Refuge:

studies of distribution and movements of the Central Arctic Caribou Herd . . . show that the animals tend to avoid the Prudhoe Bay complex, the Trans Alaska Pipeline, and the associated roads.

Final Finding Of The Director, State of Alaska Oil And Gas Lease Sale 36, 16 [hereinafter Sale 36 Finding]. Caribou populations can be negatively affected by "the cumulative effect of displacement and disturbance from" oil exploration, development and production. Sale 36 Finding at 33. This could, "in the long run, depress population levels."⁶ The Department of Interior concluded that the effects of drilling for oil on the coastal plain of the Refuge on the Porcupine Caribou Herd would be "major." FLEIS at 166.

In addition to impacts from the presence of development itself, caribou are also particularly sensitive to the inevitable oil spills. In examining the environmental impacts of offshore oil and gas lease sales near the Arctic National Wildlife Refuge, the United States noted that:

Caribou sometimes frequent barrier islands and shallow coastal waters during periods of heavy insect harassment and may become oiled or may ingest contaminated vegetation. Toxicity studies of crude oil ingestion in cattle indicate that anorexia, significant weight loss, and aspiration pneumonia leading to death are possible adverse effects of oil

⁶Sale 36 Finding at 33; *see also* Brian O'Donoghue, *Oil Development Slows Caribou Births--Studies*, Fairbanks Daily News-Miner, August 17, 1995, at A1; Steve Rhinehart, *Oil Field Caribou Decline; State finds fewer in Arctic herd*, Anchorage Daily News, October 21, 1995, at A1.

ingestion in caribou. These possible effects could increase mortality rates of caribou that interact with oil pollution.⁷

Polar bears also will be adversely affected by drilling of the submerged lands. Most, if not all, of the submerged Refuge lands in dispute in this case are known polar bear denning habitat. FLEIS at 129; Alaska Offshore Oil Decision at 16-17. Indeed, the most important land denning area in Alaska is a coastal strip in the Arctic Refuge. FWS 1995 Report at 7. Generally, polar bears reside on floating pack ice except while denning. Alaska Offshore Oil Decision at 16. Polar bears will move into nearshore areas in early fall to den in shorefast ice and snowdrifts on barrier islands and the coastal plain. *Id.* at 17. Cubs are born in mid-winter and emerge from the dens with their mothers in March or April to head out to the pack ice. *Id.*

"Polar bears are particularly sensitive to human activities during the denning period." FLEIS at 129. If disturbed during denning, polar bears will usually abandon their dens, which can be fatal to cubs unable to travel with their mothers. *Id.* Disturbance during denning is particularly problematic because "mortalities of female polar bears are now about the maximum the Beaufort Sea population can sustain without a decrease in population levels." *Id.* at 130 (citation omitted). Potential sources of disturbance include

⁷Federal Outer Continental Shelf Oil And Gas Lease Sale 71, final EIS at 185; see also Federal Outer Continental Shelf Oil And Gas Lease Sale 91, final EIS at IV-B-70, IV-B-74 (detailing potential effects of oil spills on Porcupine Caribou Herd).

"aircraft, ships, road construction and traffic, pipelines, seismic work, drilling, and oil transport activities."⁸

Increased human-bear encounters can also be expected if drilling and associated activities occur, resulting in an increase in the number of bears shot and killed. Lentfer Testimony. Oil and other contaminants can directly harm and kill polar bears through spills or direct ingestion, or indirectly harm and kill them, through contamination of the food chain upon which polar bears rely. Lentfer Testimony; FLEIS at 130; Alaska Offshore Oil Decision at 17.⁹

The coastal areas are also extremely important for coastal and freshwater fish and other marine species. These areas are important because they are relatively warmer than the offshore Beaufort Sea waters and their brackish waters are rich in food organisms. See U.S. Fish and Wildlife Service, Fish Population Characteristics of Arctic National Wildlife Refuge Coastal Waters 1 (1988).

The importance of the lagoons as a feeding area for fish was recognized in the early 1950s by government

⁸*Arctic National Wildlife Range, 1991: Hearings on HR 1320 and 759 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 102d Cong., 1st Sess. 303, 304 (1991) (testimony of Jack Lentfer) [hereinafter Lentfer Testimony] (Mr. Lentfer is the former head of the polar bear research and management programs for both the Alaska Department of Fish and Game and the U.S. Fish and Wildlife Service.)

⁹Mr. Lentfer "do[es] not believe the effects of [oil and gas exploration and development on polar bears] can be mitigated," Lentfer Testimony at 303, and notes that it is "important to recognize that the[] effects would be cumulative and that the overall effect would be even more severe if similar impacts resulted from exploration and development activities elsewhere along the Alaskan and Canadian Beaufort coast." *Id.* at 304

researchers, including those who ultimately drew the boundaries for the Arctic Wildlife Range:

the accretion lands are in the forms of reefs offshore, along the Arctic coast--miles and miles of thin thread-like reefs that stick up, gravel bars, with the water between them and the mainland. The mainland tundra plains reach back to the mountains, and the sun comes out and melts the ice and snow in the spring, and the waters flow down at tremendous speed in those north-flowing rivers, fifty of them or so, and into those lagoons between the reef and the shore, the water becomes virtually potable.

You have freshwater types of fish that come out of those mountains and go down into the lagoons and mature. Part of their lifecycle depends upon this flushing out and the utilization of this reef system, with the lagoons behind them, as against the ocean waters and the intense masses of ice offshore, far out.

George Collins, *The Art and Politics of Park Planning and Preservation* 192 (1980) (history of early 1950s research and surveys of the Arctic) [hereinafter *Park Planning*].

Sixty-two species of fish are found in the coastal waters of the Beaufort Sea, FLEIS at 34, and thirty-six species inhabit the rivers and lakes of the Refuge. The Arctic Char, Arctic Cisco, and the Arctic Grayling are anadromous fish that spend nine months of the year in upland river habitat; during the summer they move to nearshore coastal waters for intensive feeding. Roughly ninety percent of the yearly feeding done by these fish is conducted in the warm brackish waters of the shallow estuarine "mixing zone" where coastal plain rivers empty

into the Beaufort Lagoon and Beaufort Sea. Fish populations can be harmed by changes in habitat caused by oil activities, such as obstacles to free fish passage. FLEIS at 136-37.

The endangered Bowhead whales off the Alaskan coast number approximately 8,000. Probably the most critical portion of the Bowhead's annual migration is the few months spent off the coast of the Arctic Refuge (from Barter Island to the Canadian border), where they feed off the high-calorie zooplankton created in the Beaufort lagoon's estuaries.¹⁰ Offshore support facilities, including the construction and presence of a gravel causeway to transport oil from the submerged lands west to Prudhoe Bay, see *Trustees for Alaska v. State*, 795 P.2d 805, 810 (Alaska 1990) (discussing transportation options for state oil and gas lease offshore of the Refuge), could have severe impacts on Bowhead whales. See, e.g., Alaska Offshore Oil Decision at 49-50 (noting importance of restricting offshore activities during Bowhead whale migration).

Internationally important migratory waterfowl and shorebirds also concentrate in and near coastal lagoons and on barrier islands for nesting, feeding and staging. Alaska Offshore Oil Decision at 23. One hundred and thirty-five species of waterbirds have been observed on the Arctic Refuge's coastal plain. *Confrontation in the North* at 18. Of the millions of birds that inhabit the Arctic Refuge for some period of the year,¹¹ the vast bulk occupy the lands and waters in the vicinity of the Beaufort Sea lagoons. This is

¹⁰L. Lowry and K. Frost, *Foods and Feeding of Bowhead Whales in Western and Northern Alaska*, 35 Sci. Rep. Whales Res. Inst. 1-16 (1984).

¹¹Two species of duck alone--the Eider and the Oldsquaw--account for 1.5 million. U.S. Ex. 44.

due not only to the rich feeding materials found in the waters, but equally to the many different types of waterbird habitat that are located within proximity to the lagoons. Bird Populations at 25.

Activities which require the use of heavy equipment and repeated aircraft flights near the nests could disrupt nesting and resting birds. The effects of such disturbances could include loss of eggs, inability to feed and develop sufficient fat reserves, and abandonment of molting areas.

Alaska Offshore Oil Decision at 23 (citation omitted); see also FLEIS at 131-32. Nearshore facilities could also adversely affect tundra swans and the hundreds of thousands of snow geese which use the coastal plain, lagoons and barrier islands. FLEIS at 133.

As the *Exxon Valdez* oil spill amply demonstrated, direct contact with oil spills by birds is usually fatal. Alaska Offshore Oil Decision at 23. This is "particularly [true] in lagoons where waterfowl congregate in large numbers." FLEIS at 132. Oiled birds die from hypothermia, shock, or drowning. Alaska Offshore Oil Decision at 23. Hydrocarbon and other contaminants can also be ingested, either directly through preening or indirectly through consumption of contaminated foods. This can lead to "reduce[d] reproductive ability" and "chronic toxicity." Alaska Offshore Oil Decision at 23.

Wilderness and Recreation

The coastal plain of the Refuge "has outstanding wilderness qualities: scenic vistas, varied wildlife, excellent opportunities for solitude, recreational challenges, and scientific and historic values." FLEIS at 46.

The coastal plain study area is primeval land and offers excellent opportunity for solitude, which is further enhanced by the wilderness status of the land immediately south and east and the Arctic Ocean to the north of the area. There are no roads in the area or designated trails for wilderness travelers, but most travel occurs along river courses. However, even in close proximity to another party, the meandering shape of stream valleys provides adequate opportunity for seclusion.

In traveling by primitive means across the coastal plain, the visitor experiences true solitude and wilderness. Such experience is reminiscent of the hardship, challenge, drama, and peril faced by the early American pioneers, but which is becoming increasingly difficult to experience today.

... A visitor can, within the span of a few days, go from the alpine zone of ice, snow and rock, to alpine meadows, and arctic tundra valleys. Leaving the mountains, one traverses tussock tundra foothills, braided river floodplains, and rolling tundra plains. Near the arctic coast, one encounters the flat thaw lake plain, and the coastal zone of wetlands, lagoons, barrier islands, and the ocean. This recreational variety is unavailable within such a short distance anywhere on the Alaskan north slope.

Baseline Study at 480.

One could hardly argue with the United States' conclusion that these values "would be destroyed by the addition of oil facilities." FLEIS at 144. The unique and spectacular esthetics of an unspoiled and vast land simply

cannot survive the erection of an oil drill, or the gash of an oil pipeline. Moreover, the

[n]oise and presence of oil-development facilities would not only eliminate the wilderness character in the [coastal plain] area, but there could also be some visual and sound intrusions in the designated Wilderness by activities and developments in the [coastal plain] area.

FLEIS at 144. The opportunity for scientists to study an undisturbed ecosystem would also be eliminated. *Id.*

Even if one were never to visit the Refuge, simply knowing that there exists in America one such place, where an entire ecosystem is left undisturbed from the hand of man, satisfies a need traced to the very soul. As Justice Douglas writes:

Most people have an interest in the preservation of wilderness even though they may be too old to backpack or have wholly different interests. . . . The very presence of a remote wilderness area that only a handful of people visit a year gives a new dimension to a nation. For it supplies an element of mystery and awe, a real sanctuary of a sort, a genuine frontier that man has not despoiled. In these things most citizens take pride.

People treasure our wilderness, as they treasure Mt. Everest, even when they are too frail to visit it. They get comfort and security too, from the realization that we still possess some of the original America as it was in the beginning.

William O. Douglas, *A Wilderness Bill Of Rights* 85 (1965).

B. To Protect The Paramount National Interest In Nearshore Lands Of The Arctic National Wildlife Refuge, This Court Should Conclude That The Refuge Encompasses the Disputed Submerged Lands.

1. The Disputed Submerged Lands Are Within the Refuge Boundary.

The extraordinary wildlife and wilderness values of the coastal plain, barrier islands, and offshore lagoons in particular, must be considered in determining the boundary of the Refuge. Relying on the plain meaning of the boundary description and noting that the United States' original justification for the Range included references to the "river bottoms" and the "seacoast" and the variety of animals that depend on that habitat, the Special Master determined that "the disputed lands—including lagoons, tidelands, and the tidal parts of rivers—are inside the boundary of the Range." Report at 499. Given the importance of the submerged lands and tidelands to the wildlife, wilderness and recreation values of the Refuge, tying its boundary strictly to the shore would defeat the purpose of its designation.

As the Special Master notes, at the time the application for establishment of the Alaska Wildlife Range was submitted, the evidence showed that the United States intended all disputed lands to be included. Report at 489-90 (Master's discussion of importance of disputed lands to wildlife of the Refuge). The very people who drew the boundary for the United States support this conclusion. See *Park Planning* at 177-200, see especially 192 (government researcher and surveyor George Collins, based on his surveys of the early 1950s, notes importance of coastal lagoons to ecology of area ultimately included within Arctic Wildlife

Range). The voluminous information gathered since that time underscores the essential character of the coastal lagoons and barrier islands to the integrity of the Range. See *supra* pp. 8-10, 14-21.

The central relevance of the purposes of the land designation as an aid in defining the boundary of the Range is supported by the Special Master's recommendations confirming the United States' ownership of submerged lands in the National Petroleum Reserve, Alaska (NPRA). Report at 364-65, 380. In making the NPRA boundary recommendation, the Special Master focused on the original purpose of the NPRA: reservation of underground petroleum resources. Report at 380. The Master concluded that to draw the boundary as the State suggested, excluding submerged lands, would defeat the purpose of the land designation in the first place, as it could effectively allow the State to access petroleum reserves set aside in the NPRA. See Report at note 68 and accompanying text.

With respect to the Arctic National Wildlife Refuge, the State of Alaska would have the Court define the Refuge's northern boundary to follow the "sinuosities of the extreme low water line along the mainland" including within the boundary only those "offshore bars, reefs, and islands that are above the line of extreme low water." Alaska Reply Brief at 18. As with the NPRA, such a ruling would defeat the purpose of the Refuge. The previous sections describe in detail how the submerged lands and associated waters sought by the State form the very heart of the biological core of the Refuge. It is here where caribou seek shelter from harmful insect attack, millions of migratory birds feed, anadromous fish mature, and plankton bloom to sustain the bowhead whale. These values would all be jeopardized by exclusion

from the Refuge and transfer to the State. The same can be said for the Refuge's unique wilderness and recreation values. These are the values the United States sought specifically to protect in establishing the Range. The Special Master's inclusion of the disputed submerged lands within the boundary of the Refuge must be affirmed if the reservation is to serve its purpose.

2. The United States Retained Ownership Of The Submerged Lands Within The Boundaries Of The Arctic National Wildlife Refuge.

The significant national values of the coastal area of the Refuge also support the United States' claims to ownership of the disputed submerged lands. Many, if not most, of the lands subject to this dispute are offshore submerged lands, the disposition of which is governed by the Submerged Lands Act. 43 U.S.C. 1301 *et seq.* These lands are those submerged under the shallow lagoons, between the edge of the mainland and the barrier islands and reefs offshore below the low tide line. The Special Master improperly concluded the reservation of these lands by the United States was ineffective because he misinterpreted section 6(e) of the Alaska Statehood Act. Even if the Special Master had doubts about the meaning of section 6(e), he should have applied the rule of construction that favors the national interest in interpreting federal grants. Proper application of the rule requires a conclusion that the United States effectively withheld the disputed offshore submerged lands from Alaska.

Because the enactment of the Submerged Lands Act was an exercise of the federal government's constitutional power to dispose of federal property, this Court has

concluded its grant of lands must be construed narrowly and in favor of the United States. See *California, ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 285, 287 (1982). This conclusion applies the longstanding rule that statutory grants are to be "construed strictly in favor of the public, and whatever is not unequivocally granted is withheld." *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562 (1892). "[I]f there are doubts they are resolved for the government, not against it." *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957) (citation omitted). This rule exists to protect the federal sovereign and the national interest in federal public lands from grantees claiming "more than what was expressly included," *United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960) (citation omitted), and has been applied in a variety of circumstances to protect the national interest in certain lands. See *Andrus v. Charleston Stone Prods. Co.*, 436 U.S. 604, 617 (1978) (applying the rule to a federal mining statute); *Grand River Dam Authority*, 363 U.S. at 235 (applying the rule to a statute granting rights to construct dams across nonnavigable streams); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983) (applying the rule to the Stock-Raising Homestead Act).

In this case, it is particularly appropriate and important to apply the rule of construction to the federal retention of the submerged lands of the Arctic National Wildlife Refuge. The submerged lands of the Refuge are of unparalleled public value. This national interest in the Refuge's submerged lands must be protected from too broad a construction of the federal grant in the Submerged Lands Act. The fundamental purpose of the Refuge would not be

served if the United States were to be denied federal ownership of the submerged lands.

That result also should apply to tidelands. Some of the disputed lands are tidelands (lands between low and high tide) and lands underlying inland navigable waters. These lands, too, can be retained by the United States, as recognized by the Submerged Lands Act, subject to the constitutional limitation that the reservation be for a public purpose, *Utah Div. of State Lands v. United States*, 482 U.S. 193, 200-01 (1987), and that the intent to retain ownership be apparent. See 43 U.S.C. § 1313(a).

In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court found that a federal reservation included title to submerged lands, even where no explicit reference to the lands was made. See also Report at 420. The federal government reserved "the body of lands known as Annette islands" to create an Indian reservation. Because the Tribe relied on the lands underlying navigable waters for sustenance and "could not sustain themselves from the use of the upland alone," the Court found the reservation to include the waters and submerged lands adjacent to the islands. *Alaska Pacific Fisheries*, 248 U.S. at 89. Thus, because accomplishment of the purpose for the federal reservation required the inclusion of submerged lands in the reservation, the Court construed the reservation to embrace those lands.¹²

¹²In *Montana v. United States*, 450 U.S. 544 (1981), a case involving inland waters not subject to the Submerged Lands Act, the Court confirmed the approach taken in *Alaska Pacific Fisheries*, though reaching a different conclusion because the purpose of the reservation did not require inclusion of lands under a river.

In the case of the Arctic National Wildlife Refuge, as the previous sections demonstrate, the fundamental purpose for the reservation--protection of the area's wildlife, the intact ecosystem, and the associated wilderness--would be destroyed if the submerged lands and lands underlying navigable waters were not included in the reservation. Many of the species of wildlife that inhabit the Refuge rely on these lands and waters for their survival, much as the Tribe in *Alaska Pacific Fisheries* relied on the submerged lands for theirs.

To ensure that the unique and fragile resources of the Arctic National Wildlife Refuge are protected as was intended by the original reservation and is necessary to safeguard the national interest, this Court must conclude that the disputed submerged lands are within the Refuge and owned by the United States.

CONCLUSION

As its name suggests, a primary reason the United States established the Arctic Wildlife Range was to preserve and protect the incredible wildlife present on the Range. The coastal lagoons and lands underlying navigable waters are essential to this wildlife.

A decision by this Court, therefore, that these lands belong not to the American people but to the State of Alaska, which desires immediately to exploit them through oil drilling, would eviscerate the very reason the Range was established in the first place and irrevocably change the supreme wilderness character of the area.

The central significance of the disputed lands to the unique and world-renowned wildlife and wilderness values of the Arctic National Wildlife Refuge lead to the conclusion

that the lands were not transferred to the State of Alaska at the time of Statehood. The Court should find that the lands were retained in federal ownership, thus rejecting the Special Master's recommendation on Question #9; and find that the boundaries of the Range included the disputed lands, thus adopting the Special Master's recommendation on Question #10.

Respectfully submitted,

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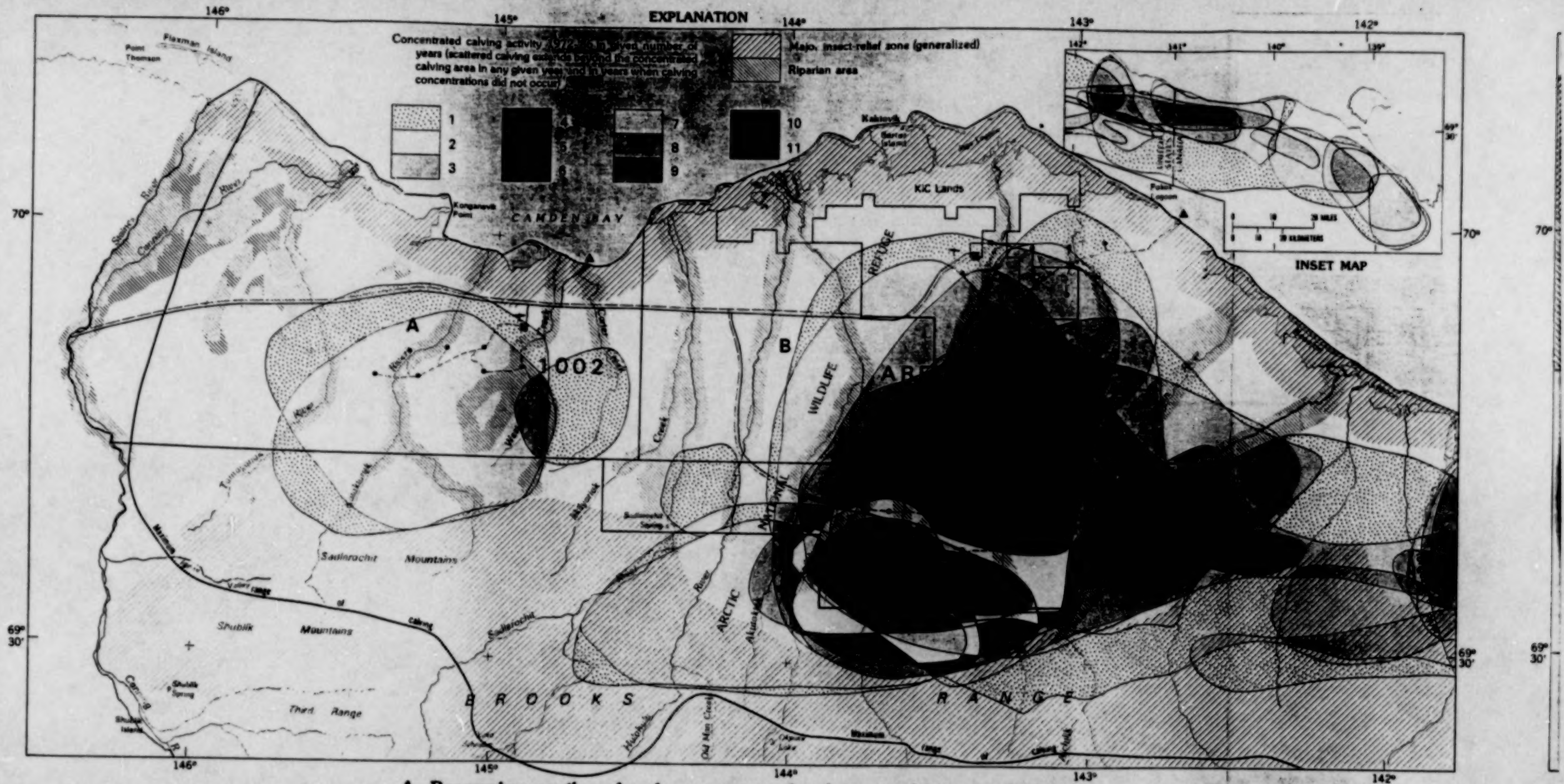
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App. 1 Photograph of Portion of Porcupine Caribou Heard
seeking relief form Mosquitos along Beaufort Sea lagoons.
Reprinted from D. Miller, Midnight Wilderness 23 (1990).





App. 2 U.S. Government map depicting coastal areas relied upon by caribou for insect relief. *Reprinted from* U.S. Dept. of the Interior, *Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource Assessment, Report and Recommendation to Congress and Final Legislative Environmental Impact Statement* (pocket) 1987.



A. Porcupine caribou herd concentrated calving and insect-relief areas

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Supreme Court, U.S.

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No. 84, Original

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

**ON EXCEPTIONS TO THE REPORT OF
THE SPECIAL MASTER**

**SUR-REPLY BRIEF FOR THE UNITED STATES
IN SUPPORT OF EXCEPTION**

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

ON EXCEPTIONS TO THE REPORT OF
THE SPECIAL MASTERSUR-REPLY BRIEF FOR THE UNITED STATES
IN SUPPORT OF EXCEPTION

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has excepted from the Special Master's conclusion that the United States does not own the coastal submerged lands within the Arctic National Wildlife Refuge (Question 9). We submit that the United States expressly retained those lands by filing a pre-statehood application that, as a legal matter, set apart as a wildlife refuge all lands within the proposed boundaries of the Arctic Wildlife Range. Alaska's contentions to the contrary are neither persuasive nor on point.

A. The pivotal issue under our exception is whether Section 6(e) of the Alaska Statehood Act, which expressly

excepted from transfer to the State "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife" (Pub. L. No. 85-508, 72 Stat. 340-341), retained in federal ownership coastal submerged lands in what is now the Arctic National Wildlife Refuge. At the time of statehood, the United States had set aside those lands through the regulatory mechanism of an application for withdrawal. That application, which specifically embraced offshore submerged lands, had the legal effect of subjecting the lands to administration as a wildlife refuge. See 43 C.F.R. 295.11 (1958 Supp.). The United States had accordingly "set apart" those lands "as [a] refuge[] * * * for the protection of wildlife." See Brief for the United States in Support of Exception (U.S. Except. Br.) 39-51.

B. Alaska devotes only a small portion of its brief to confronting our construction of Section 6(e) and the Interior Department regulation. See Alaska Reply Br. 39-46. Alaska contends that the application did not "withdraw[] or otherwise set apart" those lands as a wildlife refuge within the meaning of Section 6(e) because the regulation provided that the Bureau of Land Management continued to exercise "administrative jurisdiction over the segregated lands" (43 C.F.R. 295.11(a) (1958 Supp.)) pending formal withdrawal. Alaska Reply Br. 40. The relevant issue under Section 6(e), however, is whether the lands had been "set apart" as a wildlife refuge, and not which agency had jurisdiction over "the segregated lands" pending completion of the formal withdrawal.

Section 6(e), which specifically refers to lands "withdrawn or otherwise set apart" as a wildlife refuge, necessarily extends beyond formal withdrawals and includes federal applications that segregate lands for a wildlife refuge. See U.S. Except. Br. 43. Contrary to Alaska's contentions (Alaska Reply Br. 41-42), there is no need to

consult the legislative history to determine Section 6(e)'s meaning. But in any event, there is nothing in Section 6(e)'s legislative history that undermines the plain import of the statutory language.

Alaska's challenge to the Solicitor of the Interior's interpretation of the Interior Department regulation is without merit. See Alaska Reply Br. 43. The Solicitor has concluded that under the regulation, an application for withdrawal and a formal withdrawal have an "identical" segregative effect. *The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska*, 86 Interior Dec. 151, 176 (1978), modified and supplemented in other respects, 100 Interior Dec. 103 (1992). Alaska errs in relying (Alaska Reply Br. 43) on a prior memorandum to the contrary by a Deputy Solicitor. The Solicitor repudiated that memorandum, finding that it "contains almost no reasoning to support its conclusion." 86 Interior Dec. at 176.

Alaska is also mistaken in its contention (Alaska Reply Br. 44) that Section 6(e) is ineffective to retain federal ownership of the lands in question because it is phrased in terms of an exception to transfer. The effect of the exception is to retain lands in federal ownership. Contrary to Alaska's suggestion (Alaska Reply Br. 45-46), there was no need for Section 6(e) to make a specific reference to submerged lands. Section 6(e) was written with reference to the federal withdrawal process and, as the Master explained, the description of the retained lands in the withdrawal application clearly included submerged lands. See Report 477-499.

C. Alaska's devotes most of its energy to contentions based on the Equal Footing Doctrine. Alaska Reply Br. 11-15, 25-38, 46-49. Alaska's arguments, however, misdirect the inquiry. The Equal Footing Doctrine establishes a presumption that Congress retains title to submerged

lands beneath inland waters in pre-statehood territories for the benefit of future States. But contrary to Alaska's contentions (*id.* at 11-29), there is no occasion to invoke that presumption in this case, because Congress expressly addressed the ownership of those lands through the Submerged Lands Act and the Alaska Statehood Act. Moreover, the Equal Footing Doctrine applies only to inland waters and has no application to lands beneath the territorial sea. *United States v. California*, 332 U.S. 19 (1947) (*California I*).

Alaska is also mistaken in its contention that the Submerged Lands Act extends the Equal Footing Doctrine's presumption to the territorial sea. See Alaska Reply Br. 29-38. As the Master explained, this Court has previously rejected similar contentions that the Act repudiated the Court's decision in *California I*. Report 392-393; see *United States v. Maine*, 420 U.S. 515, 524 (1975). Furthermore, because the Submerged Lands Act and the Alaska Statehood Act are grants of federal lands, they must be construed strictly in favor of the United States. See *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 287 (1982).

Finally, this Court should not consider Alaska's belated challenge to the Master's recommendation on Question 10, which addressed the location of the coastal boundary. Alaska Reply Br. 16-25. As Alaska concedes (*id.* at 16 n.7), it did not except to that recommendation within the time allowed for filing exceptions. Alaska's justifications for failing to file an exception are without merit, and Alaska has therefore waived its right to challenge the Master's recommendation. In any event, the Master correctly determined that the boundary extends to the extreme low water line on the seaward side of all offshore bars, reefs and islands and includes within the Refuge the

submerged lands encompassed within that line. Report 477-499.

ARGUMENT

The United States agrees with the Special Master's statement of the general principles that control whether the United States or the State owns the coastal submerged lands within the Arctic National Wildlife Refuge. Our exception is limited to a narrow but important point in the Master's statutory analysis. See U.S. Except. Br. 28. By contrast, Alaska's arguments depart from the Master's conceptual framework and create confusion over the proper mode of analysis. We therefore begin by resummarizing the general legal principles relevant to our exception.

A. The United States Has Retained Ownership of the Coastal Submerged Lands Within the Arctic National Wildlife Refuge Through Section 6(e) of the Alaska Statehood Act

The United States and Alaska dispute ownership of coastal submerged lands within the Arctic National Wildlife Refuge. Those lands include both lands beneath the territorial sea and lands beneath coastal inland waters. See Report 461 n.13. The lands beneath the territorial sea extend seaward from the coastline, which follows the low water line and the seaward limits of coastal inland waters. See Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, Arts. 3, 5, 7, 13, 15 U.S.T. 1606-1610 (hereinafter the Convention). The lands beneath coastal inland waters include tidelands (the lands between mean high and low water marks), lands beneath features that qualify as bays, and some of the lands beneath the mouths of rivers. See *ibid.*; see also

United States v. California, 381 U.S. 139, 165 (1965) (*California II*).¹

By virtue of the Property Clause of the Constitution, the United States owns and has plenary power over all of the coastal submerged lands in the pre-statehood territories. See U.S. Const. Art. IV, § 3, Cl. 2. The Court has drawn a distinction, however, between the lands beneath the territorial sea and the lands beneath inland waters. The United States has paramount constitutional power over lands beneath the territorial sea. See *United States v. California*, 332 U.S. 19 (1947) (*California I*). The United States also owns the lands beneath coastal inland waters in pre-statehood territories, but it presumptively holds title to those lands in trust for future States. See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). See Report 15-16; U.S. Except. Br. 31-34; Brief for the United States in Opposition to Exceptions of the State of Alaska (U.S. Reply Br.) 51.

Congress has exercised its constitutional powers under the Property Clause through enactment of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* See *United States v. Maine*, 420 U.S. 515, 524 (1975). That Act grants to the States a specified measure of submerged lands, and it confirms continued federal authority over other submerged lands, including the outer continental shelf. See 43 U.S.C. 1302, 1311-1314. The Act also provides exceptions to the grant of submerged lands to the States, specifically excepting, *inter alia*, "all lands expressly retained by * * * the United States when the

¹ We use the terms "coastal" or "offshore" submerged lands and "coastal" inland waters to distinguish coastal features from non-coastal features, such as lakes and the non-tidal portions of rivers, which are not at issue in this litigation.

State entered the Union." 43 U.S.C. 1313(a). See Report 16 & n.1; U.S. Except. Br. 34-36; U.S. Reply Br. 52.

We submit that Congress "expressly retained" submerged lands within what is now known as the Arctic National Wildlife Refuge through the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). The Alaska Statehood Act made the Submerged Lands Act applicable to Alaska. § 6(m), 72 Stat. 343. Furthermore, the Alaska Statehood Act expressly excepted from transfer to the State "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." § 6(e), 72 Stat. 340-341. The lands at issue here fall within that exception. At the time of statehood, the United States had set aside a specific tract, through a pre-statehood federal application, to create the Arctic Wildlife Range. That application, which specifically embraced offshore submerged lands, segregated lands within the described boundaries from the operation of the public land laws. See 43 C.F.R. 295.11 (1958 Supp.). It had the legal effect of subjecting the lands to administration as a wildlife refuge, and it accordingly "set apart" those lands "as [a] refuge[] * * * for the protection of wildlife." See U.S. Except. Br. 39-51.

The Master agreed with the United States' analytical approach, but ultimately concluded that the application was ineffective to set apart the lands "as" a wildlife refuge. He stated his "controlling" consideration as follows:

The proviso to section 6(e) covers lands "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." Although the application and the regulation together caused land to be set apart for the purpose of a wildlife reservation, it was not yet set apart *as* a refuge or reservation. It may

be that the temporary segregation had essentially the same effect as a withdrawal of lands, in that both prevented disposition under the public land laws. But the segregation did not have the same effect as a reservation of lands, dedicating them to a specific public purpose.

Report 464. We disagree with the Master's analysis, because he erroneously interpreted Section 6(e) to apply only to completed withdrawals that create a permanent "reservation of lands, dedicating them to a specific public purpose." Report 464. The statutory term "otherwise set apart" is not limited to formally completed, permanent reservations, but applies precisely to a segregation like the one involved here. See U.S. Except. Br. 40-46.

In our view, the Master's interpretation of Section 6(e) presents the pivotal issue. We therefore shall first address Alaska's arguments respecting the meaning of that provision. We shall then explain why Alaska's reliance on the Equal Footing Doctrine is neither persuasive nor relevant to the resolution of the issue.

B. Section 6(e) Preserves Federal Ownership of Lands That Have Been Set Apart as a Wildlife Refuge Through A Pre-Statehood Application for Withdrawal

Alaska discusses the meaning of Section 6(e) at pages 39 to 46 of its Reply Brief. Alaska acknowledges that the federal application to create the Arctic Wildlife Range had the legal consequence, under 43 C.F.R. 295.11, of segregating the described lands for the purpose of a wildlife refuge. Alaska contends, however, that the application did not set those lands apart "as" a wildlife refuge. Alaska's five specific arguments, whether viewed individually or collectively, are unpersuasive.

1. Alaska first argues that the federal application was ineffective under Section 6(e) because the Interior Department's regulation describing the effect of a withdrawal application stated that the segregation of the lands identified in the application would "not affect the administrative jurisdiction over the segregated lands." Alaska Reply Br. 40. Alaska's argument is flawed because it fails to read the quoted language in the full context of the regulation.

The Interior Department regulation in effect at the time of the application stated in relevant part as follows:

Segregative effect of applications. (a) The noting of the receipt of the application in the tract books or on the official plats maintained by the Land Office in which the application was properly filed * * * shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.

43 C.F.R. 295.11(a) (1958 Supp.); 22 Fed. Reg. 6613, 6614 (1957); see Report 452 n.8. The segregation effected by the regulation remained in effect *unless* the application was denied. 43 C.F.R. 295.13(c) (1958 Supp.).

The regulation is significant because it verifies that the application for withdrawal of the Arctic Wildlife Range

had the legal effect of setting apart the designated lands as a wildlife refuge. See U.S. Except. Br. 41-43. As the regulation indicates, a federal agency's application for withdrawal represented a considered decision by the head of the agency that specific federal lands should be set apart for a governmental use. The regulation treated that decision as presumptively correct pending formal approval, and it segregated the lands for administration in accordance with the proposed purpose immediately upon "noting of the receipt of the application in the tract books or on the official plats maintained by the Land Office." 43 C.F.R. 295.11(a) (1958 Supp.).²

The regulation gave the application immediate effect by providing that: (1) the lands were segregated "from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws" to the extent that those actions were inconsistent with the use of the lands as a wildlife refuge; and (2) pending discretionary applications and all subsequent applications for other uses of the land were suspended. See 43 C.F.R. 295.11(a). Hence, as the Solicitor of the Interior Department has authoritatively explained, the legal effect of an application for withdrawal was to set apart the designated lands for their intended purpose. 86 Interior Dec. 151, 175-177 (1978) (discussed *infra*), modified and supple-

² Alaska mistakenly characterizes the federal agency application for withdrawal as if it were merely a private application for some public benefit. The application, however, was a *governmental* act. It could be made only by the head of an agency or his delegate, and it required thorough study and justification. See 43 C.F.R. 295.9 and 295.10 (1958 Supp.). The Department's regulation accordingly treated an application as presumptively warranted and gave it immediately operative effect. Although Alaska suggests the possibility of "frivolous applications" (Alaska Reply Br. 14), it is unable to point to any instance in which the regulation's presumption of validity was not warranted.

mented in other respects, 100 Interior Dec. 103 (1992). The Department of the Interior's public notice of the application for the Arctic Wildlife Range reflected that understanding. It stated that, pending final action, the potential uses of the designated lands—mineral entry, mineral leasing, hunting and fishing—would be administered in accordance with the federal rules governing those activities in wildlife refuges. See Report 447-448 nn.1 & 2; U.S. Except. Br. 41.³

Alaska nevertheless argues that the lands were not set apart "as" a wildlife refuge because the regulation did not affect the "administrative jurisdiction" of those lands. 43 C.F.R. 295.11(a). The test under Section 6(e), however, is whether the lands are "set apart" as a wildlife refuge, and not whether they are under the administrative jurisdiction of one particular federal agency or another. Indeed, the "administrative jurisdiction" proviso supports our submission by demonstrating the broad effect of the application on the actual management of the designated lands. The Department's regulation had the practical effect of segregating those lands for administration "as" a wildlife refuge. The change in the way the lands were administered under the regulation was so substantial that the Department found it appropriate to indicate explicitly that, notwithstanding the change, the original Interior Department component would continue to be responsible for the lands on a day-to-day basis until the withdrawal was formally completed.

2. Alaska does not confront Section 6(e)'s language, but argues instead that its legislative history does not

³ Alaska incorrectly suggests that there is some meaningful distinction between administering lands "as a refuge" and "in accordance with the limitations that apply to wildlife refuges." Alaska Reply Br. 15 n.6. Those descriptions are one and the same.

adequately demonstrate that an application would be sufficient to set apart lands as a wildlife refuge. Alaska Reply Br. 40-41. As this Court has repeatedly observed, the language of a statute is the primary and most reliable guide to congressional intent. See, e.g., *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 2149 (1995); *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989). As we explain in our brief supporting our exception, the language of Section 6(e) encompasses the situation presented here. See U.S. Except. Br. 40-46. The legislative history that Alaska cites simply paraphrases the statutory language and does not undermine our interpretation.

Alaska's resort to legislative history does, however, highlight that Alaska has no answer to our textual argument respecting Section 6(e). As we pointed out, if Congress had meant for Section 6(e) to retain federal ownership only of lands that had been formally reserved, it could have easily limited Section 6(e) to formal federal reservations. See U.S. Except. Br. 43. Instead, Congress used much broader terminology that retained in federal ownership "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." 72 Stat. 341 (emphasis added). As the Master acknowledged, "the words 'otherwise set apart' do describe the effect of an application under the regulation," Report 464. He nevertheless interpreted the phrase to require a completed withdrawal—an interpretation that renders the phrase completely superfluous. See, e.g., *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n.11 (1988).

Contrary to Alaska's assertions (Alaska Reply Br. 41-42), it does not matter whether the legislative history contains evidence that Members of Congress subjectively

considered whether the phrase proviso was "broad enough to cover lands segregated by a withdrawal application" (Report 466). E.g., *Moskal v. United States*, 498 U.S. 103, 111 (1990).⁴ But even if such subjective understandings have a bearing on the meaning of Section 6(e), Alaska is incorrect in asserting that "there is no evidence that Congress even knew that the application at issue had been filed." Alaska Reply Br. 41-42. Members of Congress referred to the Interior Department's highly publicized actions in setting aside those lands. See 104 Cong. Rec. 9410-9411 (Rep. Pelly), 12,257-12,258 (Rep. Saylor) (1958); see also Report 459-460 & nn. 11-2, 466 n.18. In addition, they received a map that showed the area as a federal enclave embracing submerged lands. U.S. Exh. 61.⁵

⁴ As Justice Jackson cautioned, a court should interpret a federal enactment "by analysis of the statute instead of by psychoanalysis of Congress." *United States v. Public Util. Comm'n*, 345 U.S. 295, 319 (1945) (Jackson, J. concurring); see also *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 116 S. Ct. 637, 645 (1996) (Scalia, J., concurring).

⁵ The Master concluded that the map did not accurately depict the boundaries of the Arctic Wildlife Range, but corresponded more closely with the boundaries of a previous and overlapping withdrawal, Public Land Order (PLO) 82. See Report 483 n.34. He stated (*ibid.*) that his view was in accord with the Solicitor's opinion, 86 Interior Dec. 151 (1978). The Solicitor had concluded, however, that PLO 82 did not include coastal submerged lands along the Arctic Ocean. *Id.* at 153. Hence, the map, which was part of a document "[o]bviously prepared in connection with statehood deliberations," *id.* at 162, is best explained as a general depiction of the combined effects of the Arctic Wildlife Range application and the PLO 82 withdrawal. In any event, the map is significant because it was submitted to Congress, and it marked the area encompassing the Range as a federal enclave embracing submerged lands. See First U.S. Post-Trial Memo. 7-8 (Nov. 28, 1980). Hence, Members of Congress who consulted the map would have been placed

3. Alaska also places great weight on an internal memorandum from a Deputy Solicitor to the Under Secretary of the Department of the Interior in 1959. See Alaska Reply Br. 43. That memorandum concluded that, in the case of a different pre-statehood application involving the Aleutian Islands National Wildlife Refuge, the government's action was ineffective in reserving tidelands. See Report 469-470. The memorandum, which was prepared after enactment of the Alaska Statehood Act, has no bearing on the meaning of Section 6(e) of the Alaska Statehood Act or Congress's understanding of the Department's regulations at that time. Cf. *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1071 (1995). Moreover, the Solicitor of the Department of the Interior repudiated the Deputy Solicitor's opinion in a published decision that addressed the precise issue involved in this case. 86 Interior Dec. 151, 175-177 (1978), modified and supplemented in other respects, 100 Interior Dec. 103 (1992).

The Solicitor concluded (as we submit here) that the 1958 application to withdraw the Arctic National Wildlife Refuge "operated to retain the lands in federal ownership, where they remain." 86 Interior Dec. at 176-177. He stated:

Under the regulations then in existence, 43 C.F.R. 295.11(a) (1959 Supplement), the application operated by itself to segregate the land from all forms of disposal under the public land laws, to the extent that the withdrawal applied for would, if finally executed, prevent such forms of disposal. This segregative effect remained until final action was taken on the application. This fact was noted and given added

on notice that the United States had set apart the submerged lands at issue in this case.

momentum in PLO 1621 signed Apr. 18, 1958, eight months before statehood.

Id. at 175.⁶ In repudiating the Deputy Solicitor's memorandum, the Solicitor noted that "it contains almost no reasoning to support its conclusion" and "it does not even consider the effect of sec. 5(a) of the Submerged Lands Act, excepting from transfer to the State those lands expressly retained by the United States." *Id.* at 176. He also noted that the Deputy Solicitor's memorandum did not consider that Section 6(e) applied to "lands withdrawn or otherwise set apart as refuges." *Id.* at 176 n.35.

The Solicitor's decision expresses the United States' longstanding position respecting the Arctic National Wildlife Refuge. Contrary to Alaska's suggestion (Alaska Reply Br. 43 & n.21), the Solicitor's decision, which is the sole authoritative opinion expressing the Interior Department's views, is entitled to deference with respect to the meaning and effect of the Department's regulations and the scope of the Department's public land orders. See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). The Solicitor determined that

the application for a withdrawal for [wildlife] purposes under then-existing regulations operated in fact to set the lands apart and reserve them for possible use for the protection of wildlife until the application could be ruled on.

⁶ As the Solicitor explained, 86 Interior Dec. at 169, PLO 1621 modified PLO 82 by opening specified lands to mineral entry and leasing, but it expressly disclaimed any effect on specified areas, including the proposed Arctic Wildlife Range. See 23 Fed. Reg. 2637 (1958). PLO 1621 accordingly confirmed the Department's understanding that those lands had been set apart for administration as a wildlife refuge.

86 Interior Dec. at 176 n.35. The Court should give "controlling" weight (*Robertson*, 490 U.S. at 359) to his determination that, in this respect, "the Department regulations in effect at that time gave an identical effect" to "an application" and "a completed withdrawal." 86 Interior Dec. at 176.

4. Alaska next argues that Section 6(e) of the Alaska Statehood Act could not result in an express retention within the meaning of Section 5(a) of the Submerged Lands Act, because Section 6(e) provides for an exception from "transfer," rather than for a retention of the designated lands. Alaska Reply Br. 44. Alaska posits a distinction without a difference. Section 6(m) of the Alaska Statehood Act provides that the Submerged Lands Act "shall be applicable to the State of Alaska." 72 Stat. 343. Section 5(a) of the Submerged Lands Act states that the States are not entitled to "lands expressly retained by or otherwise ceded to the United States when the State entered the Union." 43 U.S.C. 1313(a). As Alaska concedes (Alaska Reply Br. 44), Section 6(e) of the Alaska Statehood Act withheld from transfer to Alaska "lands withdrawn or otherwise set apart as refuges or reservations." 72 Stat. 341. The United States accordingly has "expressly retained" those lands within the meaning of Section 5(a), 43 U.S.C. 1313(a).

5. Finally, Alaska seems to contend that the United States is not entitled to submerged lands that fall within Section 6(e)'s exception because that Section and its legislative history make no specific mention of submerged lands. Alaska Reply Br. 44-45. Section 6(e), however, uses the unqualified word "lands," which under normal definition encompasses both uplands and submerged lands. The normal definition is particularly appropriate in the case of Section 6(e), because that Section addresses lands set apart for the protection of

wildlife, which frequently utilize and depend upon submerged lands for shelter, nesting, foraging, and protection from predation. Moreover, Section 6(e) was written with reference to the federal withdrawal process and, as the Master explained, the description of the retained lands in the withdrawal application in this case clearly did include submerged lands. See Report 477-499. The application for the Arctic Wildlife Range specifically described the designated parcel by a boundary that extended to "the line of extreme low water of the Arctic Ocean * * * including all offshore bars, reefs, and islands." *Id.* at 478-479. There was no reason to describe the boundary in that manner except to include both tidelands and portions of the territorial sea. See *id.* at 481-482. See discussion at pp. 29-30, *infra*.

C. Alaska's Arguments Based on the Equal Footing Doctrine are not Persuasive

Alaska responds to our position primarily by invoking the Equal Footing Doctrine. But Alaska's reliance on equal footing principles misconceives the issue and misdirects the inquiry. The question here is whether Congress intended to retain the coastal submerged lands within the Arctic National Wildlife Refuge. That question should be resolved on the basis of the two statutes that directly address that issue—the Submerged Lands Act and the Alaska Statehood Act. This Court's cases under the Equal Footing Doctrine, which all involved conveyances that predate the Submerged Lands Act, lay out only a presumption—and not a strict rule—respecting ownership of *inland* waters in those cases in which Congress has not directly addressed the issue. As we explain below, where Congress has addressed the issue through positive legislation, the Act of Congress controls. Furthermore, as we also explain below, to the extent that

Alaska is challenging the Master's ruling on Question 10, which resolves the geographic scope of the Arctic National Wildlife Refuge, its challenge is untimely and should not be allowed.

1. Alaska claims that it is entitled to the submerged lands within the Arctic National Wildlife Refuge based on the Equal Footing Doctrine. Alaska Reply Br. 11-14. The Court developed that Doctrine in recognition that the original thirteen colonies owned the land beneath navigable inland waters within their boundaries and that new States should be admitted to the Union on the same understanding. See *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195-196 (1987). The Court stated that by virtue of that understanding, the United States is presumed to hold lands beneath inland navigable waters in trust for future States. *Id.* at 196.

The Court also recognized, however, that notwithstanding the Equal Footing Doctrine, the Property Clause of the Constitution gives the United States plenary power over all land in pre-statehood territories. *Utah*, 482 U.S. at 196-197. Hence, the United States is not required to retain submerged lands for future States. The United States can "defeat a prospective State's title to land under navigable waters by a pre-statehood conveyance of the land to a private party for a public purpose appropriate to the Territory." *Id.* at 197. By the same reasoning, the United States can also retain those lands in federal ownership for its own use in support of an appropriate public purpose. See U.S. Reply Br. 53-55.

Because Congress "had never undertaken by general land laws to dispose of land under navigable waters," the Court has "inferred a congressional policy (although not a constitutional obligation) to grant away land under navigable waters *only* 'in case of some international duty

or public exigency." *Utah*, 482 U.S. at 197. The Court has additionally stated that "[i]n recognition of this policy, we do not lightly infer a congressional intent to defeat a State's title to land under navigable waters," and "a court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States." *Ibid.* The Court in *Utah* specifically rejected the United States' claim that it had retained title to the bed of Utah Lake because "Congress did not definitely declare or otherwise make very plain either its intention to reserve the bed of Utah Lake or to defeat Utah's title to the bed under the equal footing doctrine." *Id.* at 209.

This Court's decision in *Utah*, like its other equal footing cases, involved a title dispute in which the federal action in question predated the Submerged Lands Act. See, e.g., *Utah*, 482 U.S. at 199 (1889 selection of federal reservoir site did not implicitly reserve the bed of Utah Lake); *Montana v. United States*, 450 U.S. 544, 553-555 (1981) (1851 and 1868 Indian treaties did not reserve the bed of the Big Horn River); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 628-636 (1970) (1830 and 1835 Indian treaties did reserve the bed of the Arkansas River).

This case, by contrast, involves a title dispute in which the federal action—the federal withdrawal application and congressional enactment of Section 6(e) of the Alaska Statehood Act—occurred after enactment of the Submerged Lands Act. As we have explained, the Submerged Lands Act specifically addresses the question posed here: Section 5(a) provides that a new State is not entitled to "lands expressly retained by * * * the United States." 43 U.S.C. 1313(a). That test controls, and there is no need or occasion to call upon the presumptions that this Court developed in its equal footing cases, which were based on what the Court "inferred"

was the "congressional policy" before enactment of the Submerged Lands Act. *Utah*, 482 U.S. at 197.

Alaska's invocation of equal footing cases is particularly inappropriate here, because much—and perhaps most—of the submerged lands at issue in the Arctic National Wildlife Refuge are not inland waters, but lands beneath the territorial sea. This Court squarely ruled in *California I* that the original thirteen colonies had no entitlement, and the Equal Footing Doctrine accordingly does not extend, to lands beneath the territorial sea. See 332 U.S. at 30-36. At bottom, what Alaska seeks here is an extension of the Equal Footing Doctrine beyond the Doctrine's historic limits and in direct contravention of this Court's decisions. This Court has rejected that argument "time and again." *United States v. Maine*, 420 U.S. 515, 524 (1975); see *id.* at 518-525; *United States v. Texas*, 339 U.S. 707, 719 (1950); *United States v. Louisiana*, 339 U.S. 699, 704-706 (1950).

2. Alaska argues that the Equal Footing Doctrine's presumption should be applied here, notwithstanding Congress's enactment of the Submerged Lands Act, because "Congress intended the same presumption of State ownership to apply to lands granted by the Submerged Lands Act and lands subject to the equal [footing] doctrine." Alaska Reply Br. 30; see *id.* at 29-38. That argument demonstrates Alaska's misconception of the Submerged Lands Act. As we have explained, the Submerged Lands Act granted the States title to certain submerged lands, and it retained federal ownership of others. See, e.g., *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 287 (1982); *Maine*, 420 U.S. at 525-526. Alaska has no need for a "presumption" respecting "lands granted by the Submerged Lands Act," and Alaska has no right to a "presumption" respecting lands that the Act retains in federal ownership.

The specific language of the Submerged Lands Act likewise demonstrates that Alaska's contention is meritless. The Act makes no mention of "presumptions." Instead, it supplies specific statutory language conveying federal title to certain lands. Section 3(a) of the Act grants the States "title and ownership" of a specified measure of submerged lands, "subject to the provisions" of that Act. 43 U.S.C. 1311(a). Section 5(a) excepts from the operation of Section 3(a), *inter alia*, "all lands expressly retained by or ceded to the United States when the State entered the Union." 43 U.S.C. 1313(a). And Section 9 specifically confirms the United States' rights to all submerged lands "lying seaward and outside of the area of lands beneath navigable waters, as defined in [Section 2]." 43 U.S.C. 1302. The Act does not rely on, modify, or extend the judicial presumptions that would apply in the absence of those statutory terms.

Alaska's argument is also inconsistent with this Court's decisions construing the Submerged Lands Act. As the Master pointed out, the Court has previously rejected virtually identical contentions that the Act had annulled the Court's decision in *California I*. See Report 392-393. For example, the States in the *Maine* litigation contended that the Submerged Lands Act had "repudiated" the Court's holding that the Equal Footing Doctrine does not extend beyond the coastline. 420 U.S. at 524. The Court disagreed, stating that the Act's grant of a specific portion of the territorial sea "was in no way inconsistent with paramount national power but was merely an exercise of that authority." *Ibid.* See also *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 n.4 (1977) ("the Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine"). Indeed, Congress cannot "overrule"

this Court's constitutional decisions, and hence could not repudiate or annul this Court's decision in *California I*.⁷

Alaska also relies on this Court's decision in *United States v. California*, 436 U.S. 32 (1978), which involved a dispute between the United States and California over title to submerged land surrounding the Channel Islands. See Alaska Reply Br. 30, 37. The Court concluded that, under the Court's decision in *California I*, the President "had power under the Antiquities Act to reserve the submerged lands and waters." 436 U.S. at 36. The Court ruled, however, that even if the President had reserved those submerged lands and waters through a 1949 Proclamation, the Submerged Lands Act "subsequently transferred dominion over them to California." *Id.* at 37.

Alaska places special reliance on the Court's statement in that case that the "purpose of the Submerged Lands Act was to undo the effect of this Court's decision in [*California I*]." 436 U.S. at 37. But contrary to Alaska's contention, when the Court referred to the "effect" of *California I*, it was not referring to its rejection of the State's legal argument respecting the Equal Footing Doctrine. See Alaska Reply Br. 30. Instead, the Court was referring to its specific holding that the States had not acquired title to any land beneath the territorial sea.⁸

⁷ Alaska relies at length on legislative history in which certain Members of Congress criticized the Court's *California I* decision as a departure from prior law. See Alaska Reply Br. 30-36. Those statements, however, are not law, and they cannot enlarge the Submerged Lands Act beyond what its precise terms provide. As this Court recognized in *Maine*, the meaning and operative effect of the Submerged Lands Act are determined by its language, which "embraced rather than repudiated" the Court's decision in *California I*. 420 U.S. at 524; see *id.* at 524-528.

⁸ There accordingly is no merit to Alaska's argument that the "purpose" of the Submerged Land Act was "to rewrite the law as found

As the Court explained in the next two sentences, the Act granted "title" to specified submerged lands, and the submerged lands at issue "plainly fall within this general grant." 436 U.S. at 37; see Report 401-402 & n.42.⁹

Alaska simply fails to recognize the Submerged Lands Act for what it is—a substantial but nevertheless limited grant of federal lands. Congress specifically limited that grant through Section 5(a) of the Act, which withholds from the States "lands expressly retained by or ceded to the United States when the State entered the Union." 43 U.S.C. 1313(a). That phrase retains in federal ownership those lands that the United States expressly identifies as remaining in federal ownership when the State enters the Union. There is no need to look beyond the text to determine the meaning of that phrase. As the Senate Committee that drafted the provision stated, the language is "self-explanatory." S. Rep. No. 133, 83d Cong., 1st Sess. 16, 20 & n. 61 (1953). See *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear").¹⁰

by the Court in the 1947 *California* decision and apply the Pollard equal footing doctrine rule of State ownership to offshore submerged lands within State boundaries" (Alaska Reply Br. 30). See Report 392-393. Furthermore, Alaska is wrong in suggesting here (and elsewhere) that the Submerged Lands Act grants States title to *all* lands within their general geographic boundaries. See Submerged Lands Act 43 U.S.C. 1301(b) (providing a specialized definition of the term "boundaries" for purposes of the Act).

⁹ The Court's observation also distinguishes that case from the situation presented here. In this case, the United States has a valid claim under Section 5(a) of the Submerged Lands Act that the United States "expressly retained" the submerged lands at issue at the time of Alaska's statehood. See 43 U.S.C. 1313(a). See pp. 7-8, *supra*.

¹⁰ Alaska asserts that the phrase "expressly retained" should be read synonymously with language that this Court used in *Utah* to

3. As we have explained (U.S. Except. Br. 37-46; pp. 7-8, *supra*), the Alaska Statehood Act incorporates the Submerged Lands Act and expressly retains in federal ownership "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." 72 Stat. 341. The issue here reduces to a purely statutory question of whether the application for withdrawal of the Arctic Wildlife Range—which specifically included submerged lands—"set apart" those lands as a wildlife refuge. We think the answer is unambiguously yes. See U.S. Except. Br. 46. But even if the Court were to conclude that Section 6(e) is ambiguous, the settled presumptions respecting federal grants dictate a ruling in the United States' favor. See U.S. Except. Br. 46-51.

This Court has adopted and consistently followed "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983).¹¹ As Alaska acknowledges (Alaska Reply Br. 36 n.20), this Court has stated that it "adheres" to that rule in

describe the equal footing doctrine. It is difficult to imagine an interpretive approach that is more contrary to the fundamental rules of statutory construction. The legislators who voted for enactment of the Submerged Lands Act agreed to the Act's "self-explanatory" text, and not to the language of a yet-to-be written decision of this Court on the Equal Footing Doctrine.

¹¹ See, e.g., *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978); *United States v. Grand River Dam Authority*, 363 U.S. 229, 235 (1960); *United States v. Union Pac. R.R.*, 353 U.S. 112, 116 (1957); *Caldwell v. United States*, 250 U.S. 14, 20 (1919); *Northern Pac. Ry. v. Soderberg*, 188 U.S. 526, 534 (1903).

construing Submerged Lands Act grants. *California ex rel. State Lands Comm'n*, 457 U.S. at 287.¹²

There is no reason why that rule of construction should not apply to the Submerged Lands Act grant involved here. That rule carries particular force with respect to lands beneath the territorial sea. Under *California I*, the United States has paramount constitutional power over those lands. As the Master recognized in the case of the National Petroleum Reserve, Alaska is entitled to submerged lands beneath the territorial sea only to the extent that the Submerged Lands Act (as incorporated in the Alaska Statehood Act) affirmatively conveyed them. Report 393. And as the Master additionally recognized, if there are doubts about whether the United States has conveyed or retained the lands beneath the territorial sea, those doubts must be resolved in favor of the United States. See *id.* at 393-394. The Master correctly recognized those principles in the case of the National Petroleum Reserve, but he neglected to apply them to the submerged lands within the Arctic National Wildlife Refuge. U.S. Except. Br. 46-51.

¹² Alaska mistakenly dismisses the statement in *California ex rel. State Lands Comm'n* as dictum. Alaska Reply Br. 36 n.20. The issue in that case was whether the United States or California was entitled to accretions to the shore caused by an artificial jetty. California argued that it was entitled to the accretions under Section 2(a)(3) of the Submerged Lands Act, 43 U.S.C. 1301(a)(3), which grants the States filled lands. The Court refused to "read this provision of the Act as applying to the gradual process by which sand is accumulated along the shore," stating, among its reasons, that the Court's "reading of the Act adheres to the principle that federal grants are to be construed strictly in favor of the United States." 457 U.S. at 287. That statement was not dictum. The Court rejected California's doubtful interpretation of Section 2(a)(3) based in significant part on the established rule that doubts concerning federal conveyances are resolved in favor of the United States.

Under our view, Section 6(e) of the Alaska Statehood Act "expressly retained" in federal ownership lands that were "set apart" through an application for withdrawal. But even if the Court finds Section 6(e) unclear on that precise issue, it should be construed "strictly in favor of the United States." *California ex rel. State Lands Comm'n*, 457 U.S. at 287. Congress enacted Section 6(e) against the backdrop of that longstanding rule of construction, which is as old as the Union itself. See *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 738-739 (1832). Hence, Congress understood that the United States would be entitled to an interpretation of Section 6(e) in which ambiguities "are resolved for the Government, not against it" (*Watt*, 462 U.S. at 59). See *North Star Steel Co. v. Thomas*, 115 S. Ct. 1927, 1930 (1995). As that rule of construction contemplates, if Congress disagrees with the outcome, it can always expressly convey the lands in question to Alaska under the terms it deems appropriate. See U.S. Except. Br. 51.¹³

4. As we explain in our opening brief, if the Court construes Section 6(e) as the United States urges, then the United States is entitled to all of the coastal submerged lands within the boundary set out in the application for withdrawal of the Arctic Wildlife Range, including both land beneath inland waters and land beneath the territorial sea. U.S. Except. Br. 51-53. That result follows from the Master's ruling on Question 10, in which he determined that the United States had demonstrated

¹³ There is no merit to Alaska's contentions that Congress could not withhold submerged lands through a statehood act (Alaska Reply Br. 46-47) and that the Court should limit the United States' rights to something less than fee title (*id.* at 47-48). We have addressed those issues in our reply to Alaska's exceptions. See U.S. Reply Br. 72-73; see also Report 497-499.

that the boundary, even when analyzed under equal footing principles, enclosed all coastal submerged lands and was drawn with an affirmative intent to defeat the State's title to these lands. Report 477-499. Alaska contends that our discussion of this point "is so cursory * * * that it should be deemed waived." Alaska Reply Br. 5 n.3. Our discussion of that point is relatively brief, however, because the Master decided the issue in the United States' favor. Alaska did not except to the Master's recommendation concerning the boundary of the Arctic Wildlife Range or the submerged lands within it. It is Alaska that has waived the right to contest the issue.

The United States and Alaska tendered to the Special Master a joint statement identifying 15 issues for decision. See Report 509-511 (App. A). The Master organized his report on the basis of those issues, and he provided a specific recommendation on each of the questions presented. See *id.* at 503-505. This Court set a specific deadline for filing exceptions. See *United States v. Alaska*, 116 S. Ct. 1823 (1996). Alaska recognizes that the Master made a recommendation adverse to the State's interest on Question 10, and it concedes that "Alaska did not except to this recommendation." Alaska Reply Br. 16 n.7. Alaska nevertheless seeks to excuse that lapse on the ground that "the Court has indicated that subsidiary matters 'need not be dealt with separately, as they are merged in the ultimate question.'" *Ibid.*, citing *New Mexico v. Texas*, 275 U.S. 279, 286 (1927). That simply is not so in this case. The parties and the Master dealt separately with the question of the effect of the application on the withholding of submerged land from the State (Question 9) and the question of what submerged lands were included in the application if it did

withhold such lands from the State (Question 10). Alaska's exception to the Master's recommendation on Question 10 is concededly out-of-time and should not be permitted.¹⁴

Alaska's belated exception is not only inappropriate under the framework of this case and this Court's decisions and practice, but it works to the detriment of all. The Court sets a specific deadline for filing exceptions so that the Court, the parties, and potential amici will be on notice of what issues will be contested. The need for such notice is especially great in the instance of original actions, because of the complexity of those suits. In this case, the Master organized his 505-page report on the basis of 15 specific recommendations. The United States filed an exception indicating precisely which recommendation it challenged (Question 9). See U.S. Exception. There is no reason why Alaska could not do the same.¹⁵

¹⁴ Contrary to Alaska's contention, the Court's decision in *New Mexico* does not justify Alaska's untimely exception. In that case, "New Mexico, while not excepting specifically to the ultimate finding of the master as to the location of the [Rio Grande] in 1850, ha[d] filed various exceptions to matters leading to this general finding." 275 U.S. at 285-286. The Court concluded that those individual exceptions need not "be dealt with separately, as they are merged in the ultimate question whether, upon competent evidence, viewed in its entirety, the master's finding as to the location of the river in 1850 is correct." *Id.* at 286. Thus, the *New Mexico* case deals with the converse of the situation presented here. New Mexico filed *timely*, albeit overly specific, objections on issues "leading to [the master's] general finding," which the Court treated as "merged in the ultimate question." *Ibid.* That case does not support Alaska's filing of an *untimely* exception to one of Special Master Mann's distinct and specific recommendations.

¹⁵ Alaska's proposed rule of practice would invite parties to ignore the Court-imposed deadlines for exceptions to obtain a tactical advantage. For example, by postponing its exception on Question 10, Alaska avoided the page and time limitations on briefs supporting exceptions,

In any event, there is no merit to Alaska's belated exception (see Alaska Reply Br. 16-25). As the Master explained, the boundary description of the Arctic Wildlife Range expressly included submerged lands, including *coastal inland waters*. Report 478-482. The boundary follows the "line of extreme low water of the Arctic Ocean," which by definition includes tidelands (i.e. the lands between mean high and mean low water) as well as a portion of the territorial sea (the area between mean and extreme low water). Furthermore, the boundary description includes "all offshore bars, reefs, and islands." See Report 481. The other evidence bearing on the boundary description, including pre-statehood maps (*id.* at 483), the development of the boundary description (*id.* at 484-485), and the purpose of the Range in protecting wildlife (*id.* at 485-490), all support the Master's determination that the prescribed boundary is "a single continuous line, following the seaward side of offshore bars, reefs, and islands and, where it meets rivers, crossing such rivers at their mouths" (*id.* at 495).¹⁶

As the Master further explained, the clear purpose of drawing the boundary line to include submerged lands was to place them within the Arctic Wildlife Range and to divest the future State of title to those lands. Report 495-499. The boundary was consciously drawn to ensure that the United States could preserve and protect the national interest in the Arctic's unique fish and wildlife resources. See *ibid.* Contrary to Alaska's contention

and it disadvantaged any potential amici that may wish to address the issue.

¹⁶ Alaska objects to the Master's determination primarily on the basis that other federal boundary descriptions in Alaska were more explicit in including submerged lands. Alaska Reply Br. 20-23. The Master fully explained why those descriptions were phrased differently. See Report 491-495.

(Alaska Reply Br. 23), the boundary, which follows the line of "extreme low water" and includes "bars" and "reefs", "expressly referred" to lands beneath inland waters. See *Montana*, 450 U.S. at 554. The boundary description reflects a considered judgment that the United States could not adequately protect fish and wildlife resources of substantial importance to the Nation without ownership of the submerged lands that supported and sustained the species.¹⁷

5. Finally, the Court should not lose sight of what is ultimately at stake here. The Arctic National Wildlife Refuge is, in the words of Justice Douglas, the "last American wilderness." See Presidential Proclamation No. 4729, 45 Fed. Reg. 14,003 (1980) (designating the lands within the original boundaries as the William O. Douglas Arctic Wildlife Range). The lands and their wildlife, which have remained virtually untouched by human encroachment and commercial development, are a national treasure of "inestimable value." Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 101(b), 94 Stat. 2374. Congress retained those lands, including the coastal submerged lands, at the time of Alaska's statehood. To conclude otherwise would not only be contrary to congressional intent, but would also deprive the national government of the power to determine, on behalf of all future generations, whether that extraordinary region will retain its unique and irreplaceable character.

¹⁷ Compare *Montana*, 450 U.S. at 556 (stating that the United States did not need to retain submerged lands within the Crow Reservation because "the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life"); see also *United States v. Finch*, 548 F.2d 822, 831-832 (9th Cir. 1976) (Kennedy, J.), vacated, 433 U.S. 676 (1977).

CONCLUSION

The Court should reject the Special Master's recommendation that the application for withdrawal and creation of the Arctic Wildlife Range did not withhold coastal submerged lands with the Range from Alaska.

Respectfully submitted,

WALTER DELLINGER
Acting Solicitor General

NOVEMBER 1996

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No. 84, Original

**IN THE SUPREME COURT
OF THE
UNITED STATES**

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Plaintiff
v.
STATE OF ALASKA

**ON THE REPORT OF THE SPECIAL MASTER
SURREPLY BRIEF FOR THE STATE OF ALASKA
IN SUPPORT OF ITS EXCEPTIONS**

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 84, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF ALASKA

ON THE REPORT OF THE SPECIAL MASTER

**SURREPLY BRIEF FOR THE STATE OF ALASKA
IN SUPPORT OF ITS EXCEPTIONS**

This surreply responds to the Brief of the United States in Opposition to the Exceptions of the State of Alaska ("U.S. Opp."), and addresses the United States' arguments in order.

I. Alaska's submerged lands entitlement should be determined on the basis of the 10-mile rule.

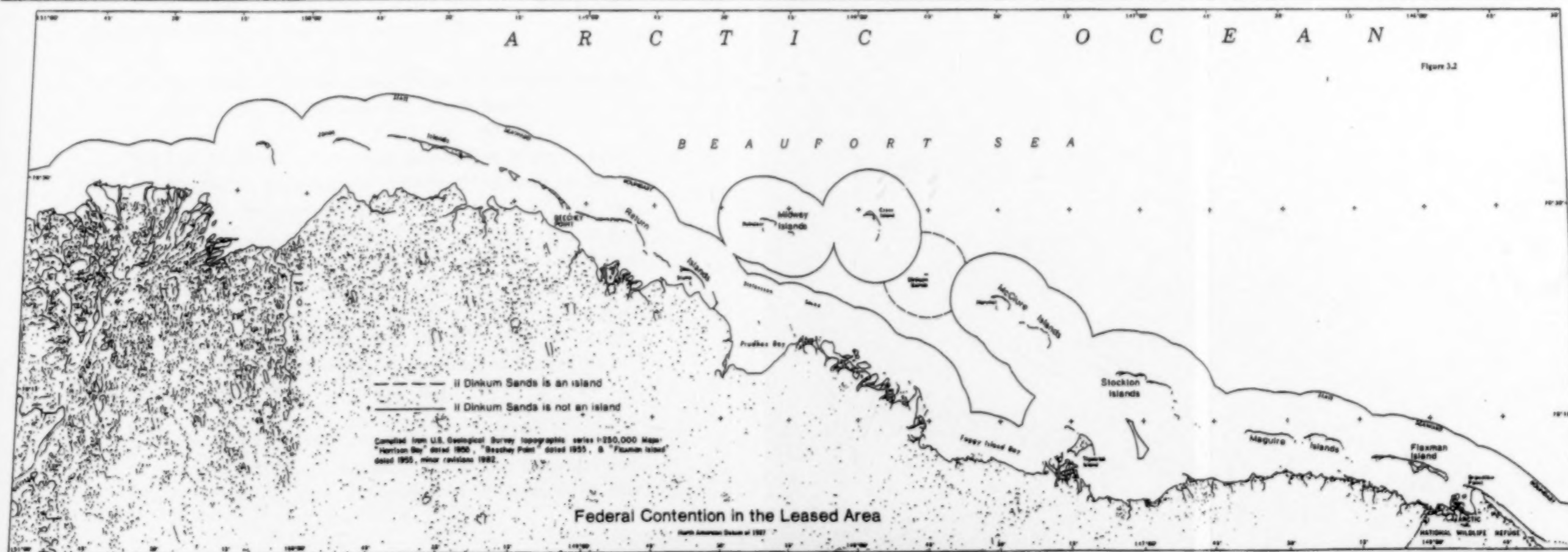
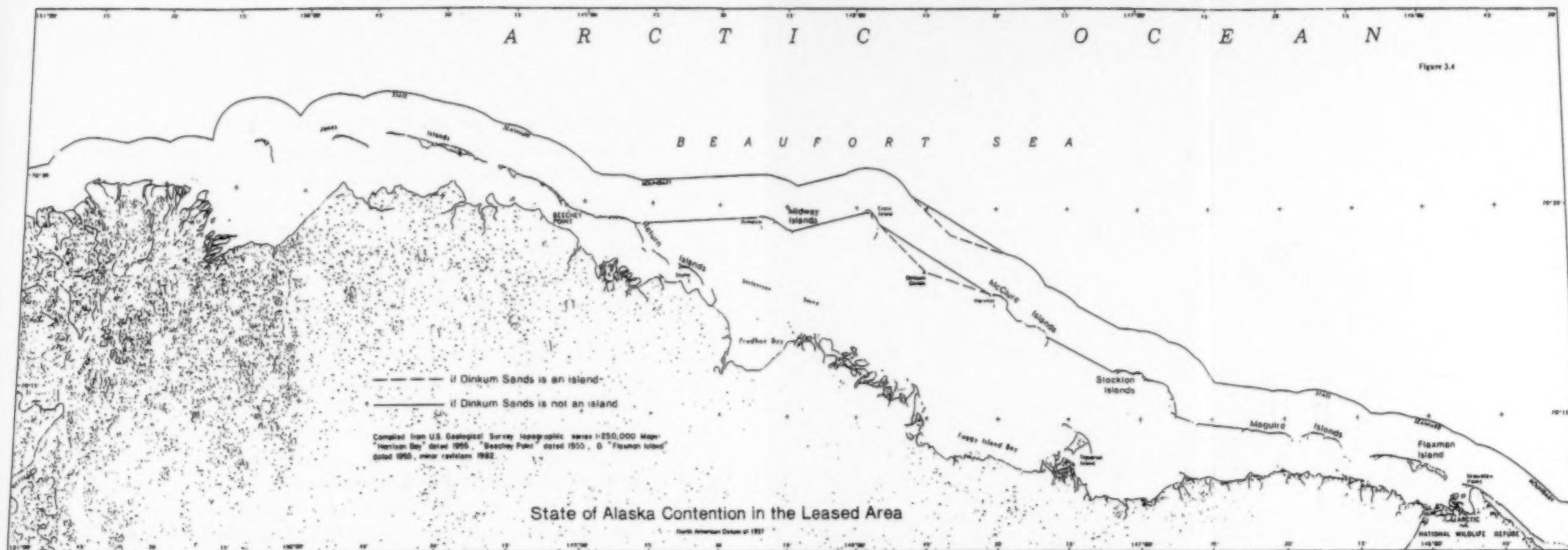
The question here is whether Alaska's submerged lands entitlement in Stefansson Sound and other areas enclosed by near-shore fringing islands less than ten miles apart is to be determined under the 10-mile rule, as Alaska contends, or the arcs-of-circles method as claimed by the United States.¹

¹ Alaska outlined its and the United States' claims and positions in the vicinity of Stefansson Sound in its opening brief. Exceptions of the State of Alaska and Supporting Brief ("Alaska Brief") at 2-5. To summarize, Alaska is entitled to lands underlying inland navigable waters under the equal footing doctrine of *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1844), and

The Court seemed to resolve this question in 1985 when it found that the United States had claimed areas enclosed by islands less than ten miles apart as inland waters from at least 1903 to 1961. *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 106-07 (1985). As set out in Alaska's opening brief, the evidence shows (1) the Court correctly found that this 10-mile rule was the United States' official policy both before and after Alaska entered the Union in 1959, (2) the United States rejected the arcs-of-circles method for areas subject to the rule both in international relations and for Submerged Lands Act purposes, and (3) it only began using the arcs-of-circles method in such areas in 1971 for reasons unrelated to international relations. Alaska's Brief at 19-40.

In response, the United States first urges the Court to ignore this evidence, mistakenly claiming that it is relevant only to an historic inland waters claim under the Convention on the Territorial Sea and Contiguous Zone ("the Convention"), Apr. 29, 1958, 15 U.S.T. (pt. 2) 1607, T.I.A.S. No. 5639, which the Court adopted for Submerged Lands Act purposes in *United States v. California ("California II")*, 381 U.S. 139 (1965). U.S. Opp. at 12-17. The United States is wrong. In *United States v. Louisiana (Louisiana Boundary*

offshore submerged lands within its boundaries under the Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-1315 (1988)), made applicable to Alaska in section 6(m) of the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339, 343 (1958) (reprinted as amended in 48 U.S.C. note preceding § 21 (1987)). Under the Outer Continental Shelf Lands Act, ch. 345, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1331-1356 (1988 and Supp. V 1993)), the United States is entitled to the offshore submerged lands that are "seaward and outside of" those granted to the States under the Submerged Lands Act. Alaska's 10-mile rule contention in the area of Stefansson Sound is shown on the Master's Figure 3.4, Report facing 28; the United States' arcs-of-circles claim is shown on the Master's Figure 3.2, Report facing 24. Both figures are reproduced opposite at reduced scale. Stefansson Sound is the only area in dispute where using the arcs-of-circles method produces "pockets" or "enclaves" of submerged lands surrounded by lands concededly owned by Alaska. See Report at 24 n.6 and 138-39.



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Case), 394 U.S. 11, 73-74 n.97 (1969), the Court explained that a State could present evidence of the United States' historic inland waters delimitation policy to show that the United States had previously drawn its boundaries in accordance with the straight baseline principles now codified in Article 4 of the Convention. Upon such a showing, the State may use such baselines to delimit its inland waters to prevent an impermissible contraction of its recognized territory. *Id.*

The United States also claims that the Court erred in finding in the *Alabama and Mississippi Boundary Case* that the 10-mile rule was the United States' policy from at least 1903 to 1961. U.S. Opp. at 18-27. In discussing the evidence of its past practices, however, the United States overlooks the same principles governing consideration of the evidence that the Master overlooked. See Alaska's Brief at 13-16. Under those principles, which the United States does not dispute, the evidence establishes that the 10-mile rule was the United States' policy from at least 1903 until 1971.

A. The United States' historic maritime delimitation practice controls resolution of this issue.

The United States erroneously claims that evidence of its historic maritime delimitation policy is relevant only to historic inland waters claims under Article 7(6) of the Convention. U.S. Opp. at 12-17. The Court made clear in the *Louisiana Boundary Case* that a State may show that the United States historically employed an inland waters delimitation system like that now authorized in Article 4 of the Convention and, if proved, may use that system to delimit its inland waters to prevent an impermissible contraction of its recognized territory:

If that had been the consistent official international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the

detriment of [a State]. Cf. *United States v. California*, 381 U.S. 139, 168: "[A] contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." We do not intend to preclude [a State] from arguing . . . that . . . the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention

394 U.S. at 74 n.97.

In the *Alabama and Mississippi Boundary Case*, moreover, the Court noted that consistent and prolonged application of a delimitation system gives rise to a "right to apply the system." 470 U.S. at 107 n.10 (emphasis added). Contrary to the United States' claim, U.S. Opp. at 17 and 20, the Court thus anticipated the very argument Alaska makes here: That, by virtue of the United States' past practice, Alaska is entitled to use the 10-mile rule to delimit inland waters independent of a historic waters claim.

Alaska's argument, accordingly, is fully consistent with the Court's adoption of the Convention in *California II*, the impermissible contraction concept described in the *Louisiana Boundary Case*, and the recognition in the *Alabama and Mississippi Boundary Case* that a State has a right to use the 10-mile rule system of delimiting inland waters if the United States consistently employed that system.² And that is what

² The United States asserts that Alaska advanced the 10-mile rule, Article 4 straight baselines, and assimilation and simplification as entirely "separate theories" before the Special Master, and has excepted only from his recommendation against use of the 10-mile rule. U.S. Opp. at 8. Alaska argued before the Master, however, that the 10-mile rule is simply a conservative application of the principles now codified in Article 4 of the Convention. See Alaska's Reply Brief on Questions 2, 3, 4, 12, 13 and 15 before the Special Master at 46-52; Volume XXV of the Transcript at 3525, 3533, and 3581-82. The Master recognized that "it is not practical to treat each delimitation method as a separate topic" for "[t]hey are interrelated in too many ways." Report at 32. Alaska's exception on this issue accordingly encompasses both of the Master's subsidiary recommendations against the 10-mile rule and

the evidence shows.

B. The evidence shows that the 10-mile rule remained the United States' policy until 1971.

Alaska showed in its opening brief that the 10-mile rule was the United States' policy not just from the 1903 Alaska Boundary Arbitration until 1961, as the Court found in the *Alabama and Mississippi Boundary Case*, 470 U.S. at 106-07, but remained its policy until renounced in 1971 for reasons unrelated to international relations.

In disputing that evidence, the United States relies heavily on the Master's analysis, U.S. Opp. at 18-27, a reliance that is misplaced. The United States does not dispute, and thus apparently concedes, that the Master overlooked the principle that minor uncertainties and even occasional contradictions in a nation's maritime delimitation practice are not legally significant. *Fisheries Case (U.K. v. Norway)*, 1951 I.C.J. 116, 138; see also Alaska's Brief at 14-15. Also, "convincing evidence to the contrary" is required to show a change in prior policy. *Fisheries Case* at 138; see also Alaska's Brief at 15. Nothing in the record provides "convincing evidence to the contrary" showing a change in the United States' position from the 10-mile rule until the United States formally renounced that position with the publication of the Baseline Committee charts in 1971.³ See Alaska's Brief at 16-36.

Article 4 straight baselines with a ten mile limitation. See *New Mexico v. Texas*, 275 U.S. 279, 286, modified as to other issues, 275 U.S. 557 (1928) (a Master's subsidiary determinations need not "be dealt with separately, as they are merged in the ultimate question"). As to the Master's recommendation regarding assimilation, U.S. Opp. at 8 n.2, the undisputed evidence shows that the United States never applied that delimitation method to its own waters. See Ak. Brief at 25 and 29 n.14; see also Alaska Exhibit ("Ak. Ex.") 85-062 at 10.

³ As to the specific items referred to by the United States, U.S. Opp. at 22-23 n.13, most of them were addressed in detail in Alaska's Brief at 22-24 (United States' international commentary in 1929 was consistent with 10-mile rule); 24-25 (United States' international proposals in 1930 preserved the 10-mile rule as a rule for straits leading to inland seas); 29 (State Department letter

In its selective discussion of the pre-Alaska statehood evidence, moreover, the United States ignores the most significant events. In its 1930 international proposals, the United States explicitly rejected the arcs-of-circles method for islands less than ten miles apart. *Id.* at 24-25. The United States used the 10-mile rule in drawing the Chapman line to delimit the coast line of Louisiana in 1950. *Alabama and Mississippi Boundary Case*, 470 U.S. at 106-07 n.9. Both the United Kingdom and Norway cited the United States' 10-mile rule policy in the 1951 *Fisheries Case*. *Id.* at 107. In the 1953 Submerged Lands Act, Congress rejected the arcs-of-circles method for near-shore fringing islands. See Alaska's Brief at 30-32. Federal officials implemented the Submerged Lands Act, the Outer Continental Shelf Lands Act, and other federal jurisdictional statutes by treating areas enclosed by near-shore fringing islands as inland waters both administratively and in proceedings in this Court. *Id.* at 32-36. As late as 1964, the United States told this court that straits formed by islands less than 10 miles apart were inland waters if they led to inland waters.⁴ *Id.* at 16-18.

The United States does not respond in any meaningful

in 1951 restated 10-mile rule for straits leading to inland seas); and 28 n.13 (State Department letter in 1952 did *not* state policies inconsistent with 10-mile rule). The United States adds to this list statements in 1949 supporting the 1930 proposals. As the 1930 proposals included the 10-mile rule as a rule for straits leading to inland seas, however, the 1949 statements also supported the 10-mile rule. The United States also cites a 1957 memorandum that did not mention a 10-mile rule. The 1957 memorandum cited the first draft of the Restatement of Foreign Relations Law of the United States, however, which recited that the United States claimed as inland waters straits formed by islands that formed a "channel of communication" to inland waters. Report at 125. Like the other evidence, nothing in either the 1949 statements or the 1957 memorandum constituted "convincing evidence to the contrary" reflecting a change in the United States' 10-mile rule policy.

⁴ The only exception was for straits connecting two areas of high seas, where the United States insisted on the right of innocent passage. Alaska's Brief at 16-18. There are no such "international straits" along Alaska's north coast.

way to the evidence of its initial implementation of the Convention following its ratification in 1961. It simply ignores Solicitor General Cox's and Shalowitz's synthesis of the United States' pre-Convention practice and Article 4 of the Convention in which they agreed that the 10-mile rule reflected both the United States' pre-Convention position and the proper application of the Convention for the future. *Id.* at 34-35. It dismisses its continued treatment of Chandeleur Sound as inland waters in the *Louisiana* litigation following the Court's adoption of the Convention in *California II* as merely "adherence to an earlier commitment." U.S. Opp. at 25. It does not explain, however, why it told the Court that adoption of the Convention for Submerged Lands Act purposes required a change in its position in the *Louisiana* case as to artificial jetties, islands and low-tide elevations, and bay closing lines, but *not* in its position that Chandeleur Sound was inland waters. See Alaska's Brief at 36-37. This silence is "evidence of the most convincing character" that the 10-mile rule remained the United States' policy following ratification of the Convention. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939).

The United States also failed to produce a joint study of the application of the Convention to the Louisiana coast line. See Alaska's Brief at 38. This study may be the strongest evidence of the United States' position under the Convention with respect to areas enclosed by near-shore fringing islands less than ten miles apart at that time. The failure to produce it "can lead only to the conclusion" that it would be adverse to the United States' current claim that continuing to close Chandeleur Sound as inland waters was simply adherence to a prior commitment. See *Interstate Circuit*, 306 U.S. at 226.

The evidence thus establishes that "the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention," *Louisiana Boundary Case*, 394 U.S. at 74 n.97, both *before* and *after* the Court adopted the Convention for Submerged Lands Act purposes.

The United States did not renounce this policy until it published the Baseline Committee charts in 1971. On those charts, the United States for the first time strictly applied the arcs-of-circles method to Stefansson Sound, Chandeleur Sound, Mississippi Sound, and all other areas enclosed by near-shore fringing islands that are less than ten miles apart. See *Alabama and Mississippi Boundary Case*, 470 U.S. at 111 (discussing Mississippi Sound); Report at 166. The State Department determined that no foreign policy reasons justified refusing to use 10-mile straight baselines in the Alexander Archipelago, the area addressed in the 1903 Alaska Boundary Arbitration at which the 10-mile rule was first so clearly articulated. See Alaska's Brief at 39-40. Nonetheless, solely because of domestic Submerged Lands Act concerns, the United States refused to reconsider its renunciation of the 10-mile rule. *Id.*

In sum, the evidence of the United States' pre- and post-Convention use of the 10-mile rule establishes that it was the United States' consistent international *and* domestic policy from at least 1903 until 1971 when it renounced that policy under circumstances strongly suggesting (and undisputed by the United States) that it did so solely to gain an advantage over the States in these Submerged Lands Act cases.

Thus, the "variations" and "differences" in the ways it expressed its policy that the United States emphasizes, U.S. Opp. at 19-20, do not detract from the two facts necessary to resolve this issue: (1) the United States employed the 10-mile rule and rejected the arcs-of-circles method from at least 1903 to 1971; and (2) the United States renounced this policy in 1971 for reasons unrelated to international relations. Under the *Louisiana Boundary Case*, 394 U.S. at 73-74 n.97, this constituted an impermissible attempt to contract the States' recognized territory, including Alaska's.

Before leaving this issue, Alaska must respond to the United States' parting remark that, "[a]t bottom, there is no consistency to Alaska's position save the principle of maximizing the State's submerged lands grant." U.S. Opp. at

27. To put these two charges of inconsistency and acquisitiveness in proper context, it is first useful to recall Justice Black's description of the *United States'* prosecution of these cases as "useless, unnecessary litigation, over an issue than can well be characterized as *de minimis* so far as the practical effect to the United States is concerned." *Louisiana Boundary Case*, 394 U.S. at 80 (Black, J., dissenting). Today, when the United States claims ownership of the submerged lands from three to at least 200 miles offshore (see, e.g., Figure 1 in Alaska's Brief facing p. 4), his comment is more apt than ever.

As to the charge of inconsistency, Alaska's position is fully consistent with the Court's finding in the *Alabama and Mississippi Boundary Case* that the 10-mile rule was the United States' consistent practice from at least 1903 to 1961. 470 U.S. at 106-07. It is consistent with the United States' rejection of the arcs-of-circles method for such areas in international relations in 1930 and the Submerged Lands Act in 1953. And it is consistent with this Court's decisions interpreting and applying the Submerged Lands Act, including the Court's adoption of the Convention for Submerged Lands Act purposes in *California II*. It is the United States that has been inconsistent, changing its position radically and to the hoped-for detriment of Alaska and the other States, by renouncing the 10-mile rule in 1971.

As to acquisitiveness, it is the United States, not Alaska, that over the past sixty years has relentlessly adopted new positions to enlarge its submerged lands domain as against both other nations and the States. In the international context, the United States has made increasingly expansionist claims of dubious legality. In 1945, it claimed the resources of the entire continental shelf off its shores, Proclamation No. 2667, 3 C.F.R. 67 (1943-1948) (reprinted in 59 Stat. 884 (1945)), a claim described as the United States' most notorious break with customary international law in this area. A. Hollick, *U.S. Foreign Policy and the Law of the Sea* 61 (1981); see also S. Swarztrauber, *The Three-Mile Limit of Territorial*

Seas 162-65 (1972). In 1976, The United States claimed a 200-mile "fishery conservation zone," Magnuson Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended at 16 U.S.C. §§ 1801-82 (1985)), soon after the International Court of Justice had indicated that 12 miles was the most permitted. *Fisheries Jurisdiction (U. K. v. Iceland)*, 1974 I.C.J. 3, 23. In 1983, the United States claimed a 200-mile Exclusive Economic Zone ("EEZ"), Proclamation No. 5030, 3 C.F.R. 22 (1983) (reprinted in 16 U.S.C. § 1453 (1985)), even though many have argued that it is not entitled to a 200-mile EEZ while it refuses to join the 1982 Convention on the Law of the Sea,⁵ because the EEZ is a creature not of customary international law but of the 1982 Convention.⁶ The United States announced two years later that, by virtue of its 200-mile EEZ, it also was entitled to continental shelf rights well beyond 200 miles. 92 Interior Dec. 459, 487 (1985).

In its relations with the States, the United States in the 1930s broke with its prior practice and disputed the applicability of the equal footing doctrine to offshore submerged lands in *United States v. California (California I)*, 332 U.S. 19 (1947). See *United States v. Louisiana*, 363 U.S. 1, 16-17 (1960). Congress then enacted the Submerged Lands Act to "undo" that decision, *United States v. California*, 436 U.S. 32, 37 (1978), only to see the United States initiate the string of cases decried by Justice Black as *de minimis* to the United States. In these cases, the United States first used the 10-mile rule to delimit the States' inland

⁵ See *The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea*, U.N. Sales No. E.83.v.5 (1983).

⁶ See, e.g., H. Caminos, *The Law of the Sea Convention, Customary International Law, and the Role of Law within the International Community*, Law of the Sea, Eighteenth Annual Conference (1984), reprinted in *The Developing Law of the Oceans* 475, 477-78 (R. Krueger and S. Riesenfeld, eds., 1985); see also J.N. Moore, *Customary International Law after the Convention*, reprinted in *The Developing Law of the Oceans, supra*, at 41, 43.

waters only to renounce it in 1971 and apply the arcs-of-circles method to contract the States' boundaries and attendant submerged lands rights. In its 1968 *Louisiana* brief, the United States admitted that Article 4 of the Convention permits claiming areas like Chandeleur Sound as inland waters but simultaneously claimed that doing so was "at variance with" the Convention. Following the Court's 1985 finding that the 10-mile rule was the United States' policy from at least 1903 to 1961, it claimed that the policy had only been stated in 1951 and "survived barely a decade" until the United States ratified the Convention in 1961. Supplemental Post Trial Brief of the United States before the Special Master, *United States v. Maine* (No. 35 Original) (Oct. Term, 1984) (Ak. Ex. 85-333) at 5. In this case, however, it claimed that it renounced the 10-mile rule and moved to the Convention's rules immediately upon signing the Convention in 1958, Report at 134, even though Assistant State Department Legal Adviser Yingling earlier had testified that the United States first moved to the Convention upon ratification in 1961. See Alaska's Brief at 36-37 n.20. Not coincidentally, a change in policy in 1958 conveniently would have predated Alaska's 1959 admission to the Union and the vesting of its submerged lands entitlement under both the equal footing doctrine and the Submerged Lands Act.

Alaska accordingly is entitled to use the 10-mile rule, now authorized by Article 4 of the Convention which the Court has adopted for Submerged Lands Act purposes, to delimit its submerged lands entitlement in Stefansson Sound and all other areas enclosed by near-shore fringing islands less than ten miles apart.

II. Dinkum Sands is an island.

Dinkum Sands is a permanent alluvial feature of the Flaxman Island chain about eleven miles north-northeast of

Prudhoe Bay.⁷ It is mostly above water at high tide, as Alaska has explained and summarizes below, only occasionally slumping below high tide. The question is whether, having this characteristic, it is an island within the meaning of Article 10 of the Convention.

Article 10 defines an island as "a naturally-formed area of land, surrounded by water, which is above water at high tide."

The Master finds this definition inadequate, and infers that "Article 10 contains an *implicit modifier* that is at least as strong as 'generally,' 'normally,' or 'usually.'" Report at 302 (emphasis added). Having thus re-written the Convention's definition, he then recommends against Alaska on Question 5, finding that Dinkum Sands does not meet the modified definition. Report at 310.

In excepting to this recommendation, Alaska showed that a feature retains its status as an island even if it is occasionally submerged, that Dinkum Sands is far more stable than the Mississippi mudlumps that undisputedly are islands, and that Dinkum Sands in any event is an island except when it is below high tide. Alaska's Brief at 45-46.

The United States makes three arguments in opposing Alaska's exception on this question. First, it claims that the *deletion* of the word "permanently" by the Convention's drafters proves that the Convention's definition of island includes an implicit modifier — in its view, apparently, the word "permanently." U.S. Opp. at 27-38. Second, it asserts that Dinkum Sands is "frequently" below mean high water and thus is not an island under the Master's revised definition, U.S. Opp. at 38-46, even though the evidence shows it mostly above that datum. Third, it argues that Dinkum Sands should not be treated as an island even for the nine or ten months of

⁷ See Report at 227, 288 and Figure 3.4, facing 28. Dinkum Sands is located in the nine-mile-wide water entrance to Stefansson Sound between Cross Island and Narwhal Island, slightly landward of the line connecting the two islands. Thus, if Alaska's submerged lands entitlement is measured under the 10-mile rule, like Louisiana's, Alabama's, and Mississippi's, Alaska is disadvantaged by having Dinkum Sands treated as an island.

the year that it is above high tide. U.S. Opp. at 46-49.

A. An island need not be "permanently" above water.

The United States argues that Article 10 impliedly requires that an island be "permanently" above water at high tide. U.S. Opp. at 28-36.

The United States unsuccessfully made a similar argument in the *Louisiana Boundary Case*, claiming that a dredged spoil bank should not be deemed part of the coast line under Article 3 of the Convention because "it is not 'purposeful or useful' and is likely to be 'short-lived.'" 394 U.S. at 40-41 n.48. The Court rejected the claim on grounds equally applicable here: "It suffices to say the Convention contains no such criteria." *Id.*

Although Article 10 now contains no requirement that an island be "permanently" above high tide, the United States bases its argument on an earlier draft definition that included this modifier. Before any international consensus had been reached, the International Law Commission in 1956 proposed defining an island as "an area of land, surrounded by water, which *in normal circumstances* is *permanently* above high-water mark." Report at 298 (emphasis added). At the United States' urging, however, the words "permanently" and "in normal circumstances" were *deleted* from this definition. *Id.* at 299-300. The *deletion* of these words, the United States now claims, proves that the definition now *includes* the word "permanently" as an implicit modifier. U.S. Opp. at 31-32.

The United States asserts that the Conference intended no "departure from the basic meaning of prior drafts" by this deletion. U.S. Opp. at 35. "Permanence," however, was not a fixture in the many and varied definitions of "island" in the years before a definition was first codified in the 1958 Convention. See Report at 294-302. Indeed, the common law of England and the United States has never required that an island be permanently above high-water mark, and permits much longer submergence than Dinkum Sands experiences.

See Alaska's Brief at 45-51. The United States apparently concedes as much, but describes the cases Alaska cites as "of no value" and "not helpful" in interpreting Article 10 of the Convention. U.S. Opp. 36-37 and n.29. It is simply implausible, however, that the United States urged the Convention to delete "permanently" and "in normal circumstances" in order to establish a new rule requiring that islands be "permanently" above water contrary to the common law rule.⁸ Under such a definition, the ephemeral Mississippi mudlumps would lose their status as islands, a status that has been a permanent fixture of the United States' and international maritime delimitation practice ever since *The Anna*, 165 E.R. 809 (1805).⁹

Dinkum Sands is far more stable than these mudlumps that have been uniformly treated as islands. Alaska's Brief at 51-54. The United States' response -- that the Court should discount that treatment as a precedent for Dinkum Sands "because of the absence of evidence concerning their behavior," U.S. Opp. at 36 -- is less than wholly forthcoming. "Solicitor General Archibald Cox described them as islands despite their highly changeable and perhaps mobile nature." Report at 292. Justice Black described them more graphically, noting that the Mississippi would "build up little

⁸ Indeed, if the Conference intended to clarify only a perceived conflict between the word "permanently" and the phrase "in normal circumstances" while maintaining a supposed "permanence" requirement as the United States suggests, U.S. Opp. at 32-33, the obvious solution was to retain "permanently" and delete "in normal circumstances." That was not done.

⁹ The United States claims that these mudlumps have never been determined to be islands within the meaning of Article 10 of the Convention. U.S. Opp. 36-37 n.29. In the *Louisiana Boundary Case*, however, the United States argued that *The Anna* held that the territorial sea is to be measured from these mudlumps "as Article 10 now provides." *Louisiana Boundary Case*, 394 U.S. at 64 n.84 (citation omitted). The United States' treatment of the mudlumps as islands under Article 10 in that case reflects its consistent recognition of their insular status both in its international relations and for Submerged Lands Act purposes. See Alaska's Brief at 47.

islands and mud elevations one day and destroy them the next" and that they "sometimes appear or disappear spontaneously." *Louisiana Boundary Case*, 394 U.S. at 83-84 (Black, J., dissenting); see also Alaska's Brief at 45-46 n.28.

In short, there is no supposed requirement that an island be either "permanent" or "permanently" above high tide. Further, as we show in the next section, Dinkum Sands is far more stable, "permanent" even, than Louisiana's mudlumps.

B. Dinkum Sands is above mean high tide most of the time.

One is tempted to charge the United States with disingenuousness for claiming that Dinkum Sands is "frequently" below mean high water, U.S. Opp. at 38, when the evidence shows that it is mostly *above* that datum. The fact that the Master found the feature to be "not generally above mean high water," Report at 310, perhaps insulates the Government from such a charge. In any event, the Court, not its Masters, determines the facts in original jurisdiction cases. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984).

The terrain of the Master's Report describing the physical characteristics of Dinkum Sands is difficult to negotiate. See Report at 236-287. The Master's own findings, however, establish certain facts. Dinkum Sands is a permanent feature of the Flaxman Island chain. Report at 288. During the open-water months of July through September, it declines in elevation. *Id.* at 309 n.66. Just before freeze-up in the fall, natural processes build it up. *Id.* at 286. Freeze-up then locks in the area for the entire winter. *Id.* The plain conclusion, lost in the denseness of the Report, is that Dinkum Sands is above mean high water for at least the nine to ten months of the year the area is frozen over.

The evidence also shows that Dinkum Sands is usually above mean high water in the summer. The Master speculated that it "may" have fallen below this datum in four of the five summers from 1979 to 1983. Report at 309 n.66.

The only summer that it was below the federal estimated value for mean high water, however, was 1981, and if Alaska's value were used, Dinkum Sands was below high water only part of that summer. Report at 249-269. The 1979 and 1980 observations were not related to mean high water, and the only observations in 1982 and 1983 that were related to mean high water showed it *above* that datum.¹⁰

In short, the evidence accordingly shows that Dinkum Sands is above mean high water during the nine to ten months the area is frozen over and for much of the open water season as well.

C. Dinkum Sands is an island at least when it is above high tide.

The United States argues that Dinkum Sands should not be considered an island even during the nine or ten months of the year that it is consistently above high tide. It asserts that making that determination would be expensive and contrary to law and that, because the Submerged Lands Act permits the Court to fix the offshore boundary between the United States and a State, it may disregard the substantial times that the feature is above mean high tide. U.S. Opp. 47-48.

Determining the height of Dinkum Sands on a periodic basis might be expensive, but is unnecessary. The Court could simply decree, on the basis of the evidence recited above, that Dinkum Sands is an island for ten months a year. Alternatively, it could direct the parties to reach agreement on

¹⁰ "Observations alone, of course, are not enough to say where Dinkum Sands lies with respect to mean high water." Report at 246. In the open water season, the water level may be as much as 1.5 feet higher than at other times as a result of seasonal variations. *Id.* at 237-238. Meteorological factors can cause the water level to rise or drop as much as four feet. See IV Tr. 479 and Inupiat Exhibit 24A-1 at 7. The Master's conclusion that Dinkum Sands "may" have fallen below mean high water in four of the five summers from 1979 to 1983 based on anecdotal observations of it below water is thus pure speculation.

submit it to the Court on the evidence or the Court could refer this narrow technical question to a master. See, e.g., *Texas v. New Mexico*, 482 U.S. 124, 134-35 (1987).

The United States writes that "Alaska suggests that this Court has found itself bound by the Submerged Lands Act to recognize ambulatory boundaries." U.S. Opp. at 47 (citation omitted). The Submerged Lands Act, and the Court's decisions under it, do of course dictate that coastal boundaries are ambulatory,¹¹ as do more than two centuries of this Court's decisions in other cases.¹²

The United States' argument that the Court should not adopt a rule under which a boundary "would oscillate suddenly and unpredictably between two distant locations," U.S. Opp. at 48, is directly contrary to the position it took when an even more dramatic oscillation favored it. Kotzebue Sound in northwestern Alaska had long been considered a juridical bay because its closing line was less than 24 miles in length as required by Article 7 of the Convention. The United States conceded that the submerged lands belonged to Alaska. When one of the headlands appeared to have eroded so the closing line slightly *exceeded* 24 miles, however, the United States claimed that the boundary had not merely oscillated but had leaped shoreward so that the United States was now entitled to the one million acres of land underlying the Sound that had previously been Alaska's sovereign submerged lands. See Memorandum from the State of Alaska to the United States Baseline Committee (July 10, 1990); and Letter from J. Ashley Roach, Chairman of the Baseline Committee, to the State of Alaska (October 31, 1990).¹³

¹¹ See, e.g., *Louisiana Boundary Case*, 394 U.S. at 32-33; *United States v. Louisiana (Texas Boundary Case)*, 394 U.S. 1, 4-5 (1969); *California II*, 381 U.S. at 176-77.

¹² See, e.g., *County of St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 66 (1874), and cases collected in *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278 (1982).

¹³ Copies of these two documents have been lodged with the Court.

Ashley Roach to the State of Alaska (October 31, 1991).¹³

Nothing in the Submerged Lands Act requires that the Court fix Alaska's submerged lands rights at a time when Dinkum Sands is temporarily submerged, as the United States suggests. U.S. Opp. at 47-48. As discussed above, that result would be contrary to law.

The Court accordingly should find that Dinkum Sands is an island for Submerged Lands Act purposes. Alternatively, it should find that it is an island for Submerged Lands Act purposes at least when it is above mean high tide.

III. Submerged lands within the exterior boundaries of NPRA passed to Alaska at statehood.

A. The same presumption of State ownership that applies to lands beneath inland waters also applies to offshore submerged lands.

As Alaska has shown, the same presumption of State ownership of lands underlying inland waters that pass to the States under the equal footing doctrine applies to offshore submerged lands granted to the States under the Submerged Lands Act. See Reply Brief for the State of Alaska ("Alaska's Reply") at 29-38. This presumption is based on Congress's historical reluctance to defeat a future State's title prior to statehood except in the most extreme and unusual circumstances. See *Utah Div. of State Lands v. United States*, 482 U.S. 193, 201-02 (1982). When it passed the Submerged Lands Act in 1953, Congress made clear that it intended offshore submerged lands within State boundaries to be subject to the same principles that apply to lands underlying inland waters, and that every State should own these lands as it had understood the law to provide before *California I*. See Alaska's Reply at 29-38.

¹³ Copies of these three documents have been lodged with the Court. Alaska respectfully requests that the Court take judicial notice of them.

Congress also intended the future State of Alaska to take title to these lands at statehood. It placed lands underlying navigable waters in Alaska, including those under tidal waters, in a statutory trust for the future State in the Alaska Right-of-Way Act of May 14, 1898, ch. 299, 30 Stat. 409 (formerly codified at 48 U.S.C. § 411; current version primarily codified at 43 U.S.C. §§ 942-1 to 942-9). Following passage of the Submerged Lands Act, Congress incorporated it into every Alaska statehood bill from 1954 to 1958¹⁴ and made clear in its deliberations on Alaska statehood that it considered the submerged lands off Alaska's shores as held in trust for the future State. See, e.g., *Alaska Statehood: Hearings on S. 50 before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 2d Sess. 281 (1954). Congress thus viewed the lands beneath the territorial sea in Alaska as it had viewed such lands offshore other States before statehood — lands held in trust for a future State whose title would not be defeated except in extreme circumstances.

The United States claims that the Court already has rejected this argument. U.S. Opp. at 56 n.39. It points to the Court's remark that its decision to choose federal common law over State law "adheres to the principle that federal grants are to be construed strictly in favor of the United States." *State Lands Comm'n*, 457 U.S. at 287. This remark was dictum. See Alaska's Reply at 36 n.20. It also ignores the Court's recognition four years earlier that "[t]he very purpose of the Submerged Lands Act was to *undo* the effect of this Court's 1947 decision in [*California I*]." ¹⁵

¹⁴ See S. 49, S. Rep. No. 1163, 85th Cong., 1st Sess. (1957); H.R. 7999, H.R. Rep. No. 624, 85th Cong., 1st Sess. (1957); H.R. 2535, H.R. Rep. No. 88, 84th Cong., 1st Sess. (1955); S. 50, S. Rep. No. 1028, 83d Cong., 2d Sess. (1954).

¹⁵ *California*, 436 U.S. at 37. The other cases cited by the United States and the Master (Report at 392-93 and U.S. Opp. at 56 n.39, citing *Oregon ex. rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), and *United States v. Maine*, 420 U.S. 515 (1975)) do not address Alaska's argument. Alaska does not argue that lands underlying the territorial sea

B. Congress did not "clearly intend" to include submerged lands in NPRA and did not "affirmatively intend" to defeat Alaska's title.

1. The Pickett Act does not authorize withdrawal of submerged lands.

The United States argues that Congress intended the 1910 Pickett Act¹⁶ to authorize the federal executive to withdraw submerged lands that in territories were, under congressional policy, held in trust for future States. U.S. Opp. at 60-61. Congress in 1910, however, knew that the term "public lands" in federal laws did not include submerged lands unless it made that intent clear.¹⁷

Indeed, the United States has relied on the Court's decisions holding that the term "public lands" does not include submerged lands. In *California I*, California had argued that the United States had recognized California's title to such lands, citing as evidence the United States' rejection of numerous applications for oil and gas leases and permits. Brief of the United States in Support of Motion for Judgment, *United States v. California* (No. 12, Original) (Oct. Term, 1946) at 194. The United States responded that it denied the

passed under the equal footing doctrine, but that Congress in the Submerged Lands Act intended them to be subject to the same presumption against defeat of State title as equal footing doctrine lands.

¹⁶ Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (formerly codified at 43 U.S.C. §§ 141-142; repealed in part 1976; current version at 43 U.S.C. § 142 (1986)).

¹⁷ In considering an Act authorizing the issuance of scrip for "unoccupied and unappropriated public lands of the United States," the Court stated: "[T]he term 'public lands' does not include tide lands" for "[t]he words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Mann v. Tacoma Land Company*, 153 U.S. 273, 284 (1894), quoting *Newhall v. Sanger*, 92 U.S. (2 Otto) 761, 763 (1875).

applications under the Mineral Leasing Act because that Act applied only to "public lands" which did not include lands below the low water mark, and not because it recognized California's title. *Id.* Because "the term 'public lands' has been held not to extend to land situated below high water mark," the United States wrote, the Department had no reason to determine ownership of the lands. *Id.* at 195.

In urging a different definition of "public lands" in the Pickett Act, a definition unique to Alaska, the United States argues that Congress must have intended the Act to include authority to withdraw submerged lands in Alaska because it had opened certain Bering Sea tidelands to mining in 1900. U.S. Opp. at 60-61, citing Report at 408 and n.49. This does not evidence any congressional understanding that "public lands" as used in the later Pickett Act included submerged lands, however. Indeed, Congress knew that the mining laws generally applied only to "public lands" or the "public domain,"¹⁸ terms that uniformly did *not* include submerged lands. That is why, in extending the mining laws to Alaska in 1900, it *expressly* extended that authority to the Bering Sea tidelands. Act of June 6, 1900, ch. 786, § 26, 31 Stat. 3231, 320-30 (current version at 30 U.S.C. § 49a (1988)). Had Congress intended the Pickett Act to apply to such lands, it would have explicitly referred to them as well, but it did not.

The Pickett Act, moreover, neither was unique to Alaska nor authorized the executive to withdraw lands from the operation of the mining laws. The United States claims that these facts are irrelevant, that the Master simply finds it anomalous for Congress not to grant the President authority to reserve submerged lands for public use while authorizing parties to appropriate those lands for private use. U.S. Opp.

¹⁸ See Lode and Water Law of July 26, 1866, ch. 262 § 1, 14 Stat. 251, (codified at 30 U.S.C. §§ 43, 46, 51 (1976)); Mining Act of May 10, 1872, ch. 152 § 3, 17 Stat. 91, (codified as amended at 30 U.S.C. §§ 22-47 (1976)); 1 *American Law of Mining* §§ 4.10, 4.11, 3.02, and n.10 (Rocky Mountain Mineral Law Foundation, eds., 2d ed. 1994).

at 61. That is not what the Master says. See Report at 408.

Further, even had the Master considered it anomalous, that does not make it so. Neither the Master nor the United States has identified any submerged lands in Alaska or elsewhere that were subject to settlement, location, sale, or entry. Congress opened a small area of Bering Sea tidelands to the mining laws, laws from which the Pickett Act did *not* authorize withdrawal. The only anomaly is the United States' argument that Congress was so concerned about mining the Bering Sea tidelands that, in the Pickett Act, it authorized withdrawal of such lands from laws providing for settlement, location, sale, or entry, laws that did *not* apply to those lands, but did not authorize withdrawal from the mining laws, the only laws that *did* apply.

The United States also implies that Congress was especially concerned with Alaska in passing the Pickett Act, arguing that the Act's objectives demonstrate a congressional intent to allow the President to reserve submerged lands. U.S. Opp. at 61. It argues that the Pickett Act's objective of preserving federal ownership of petroleum resources would have been hampered if the United States could not reserve submerged oil-bearing lands. *Id.* at 62. This argument makes little sense in historical context. Except for NPRA, all the oil and oil shale reserves created under the Pickett Act were in States that already existed and where reservation of submerged lands was impossible.¹⁹ In Alaska, moreover,

¹⁹ Naval Petroleum Reserve Numbered 1 (Elk Hills) in California (admitted in 1850) was established by executive order on September 2, 1912; Naval Petroleum Reserve Numbered 2 (Buena Vista), also in California, was established by executive order on December 13, 1912; Naval Petroleum Reserve Numbered 3 (Teapot Dome) in Wyoming (admitted in 1890) was established by executive order on April 30, 1915; Oil Shale Reserve Numbered 1 in Colorado (admitted in 1876) was established by executive order on December 6, 1916, as amended by executive order on June 12, 1919; Oil Shale Reserve Numbered 2 in Utah (admitted in 1896) was established by executive order on December 6, 1916; and Oil Shale Reserve Numbered 3 in Colorado was established by executive order on September 27, 1924. See 10 U.S.C. § 7420(2) (1996).

withdrawal of the uplands alone would preclude private appropriation of the oil resources underlying *both* the uplands *and* the submerged lands. Withdrawal of the uplands would prevent development of those lands and associated drainage of the submerged uplands. Development of the submerged lands and any associated drainage of the uplands was already precluded under the reservation for the future State in the Alaska Right-of-Way Act.²⁰

2. An "important purpose" is not a "public exigency."

The United States defends the Master's view that a pre-statehood conveyance requires only "an important purpose" to defeat a future State's equal footing doctrine rights. U.S. Opp. at 65. The Court has made clear, however, that a "public exigency" denotes extreme circumstances, not just an important purpose. The United States disposes of lands under navigable waters in territories only when "impelled" to do so in "exceptional instances." *Utah*, 482 U.S. at 197 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). The only pre-statehood conveyance of submerged lands was a "singular exception" in which the result depended "on very peculiar circumstances." *Montana v. United States*, 450 U.S. 544, 555 n.5 (1981). Indeed, the very rarity of this occurrence, found "only in the *most unusual* of circumstances," underlies the principle that the Court will not lightly infer a congressional intent to defeat a State's title to

²⁰ The United States mischaracterizes Alaska's reliance on the Alaska Right-of-Way Act. The State does not argue, as the United States claims, U.S. Opp. at 58, that this Act precluded the President from withdrawing submerged lands because an earlier Congress bound a later one. Alaska's point is that Congress, having unambiguously codified its intent to hold submerged lands in Alaska in trust for the future State, would have no need twelve years later to silently grant the federal executive the authority to withdraw them from the operation of the public land laws to which they were not subject in any event.

land under navigable waters. *Utah*, 482 U.S. at 197 (emphasis added).

The same principles apply when the United States claims that a pre-statehood reservation defeated State title. A reservation would hardly be made for an *unimportant* purpose, and *all* reservations thus would defeat State title unless the State could establish that the reservation was for *no* important purpose. This would reverse the Court's equal footing doctrine jurisprudence and establish a presumption that Congress *intended* to defeat State title. The Court has held directly to the contrary: The *United States* must "establish that Congress affirmatively intended to defeat the future State's title to such land." *Utah*, 482 U.S. at 202.

The United States also argues that creation of NPRA was in response to a "public exigency" requiring that it retain all of the submerged lands in this 23 million acre reserve. U.S. Opp. at 65-66. It does not dispute that the United States controlled the submerged lands when it created NPRA, however, and that these lands were unavailable for any oil development that might hinder the reserve's purpose as a possible "future supply of oil for the Navy." See Alaska's Brief at 62. Alaska statehood, moreover, did not constitute a "public exigency" justifying defeat of Alaska's equal footing doctrine title for in Alaska as elsewhere the United States retains the power to regulate navigable waters for national defense purposes. See Alaska's Brief at 64.

3. Section 11(b) of the Alaska Statehood Act does not express an affirmative intent to defeat Alaska's title to submerged lands.

In arguing that section 11(b) of the Alaska Statehood Act demonstrates that Congress affirmatively intended to defeat Alaska's title to the submerged lands in NPRA, the United States disregards this Court's admonition that this intent will not be found unless it was "definitely declared or otherwise made very plain, or was rendered in clear and especial words,

or unless the claim confirmed in terms embraces the land under the waters of the stream." *Utah*, 482 U.S. at 197-98 (citations omitted). The United States instead urges the Court to infer Congressional intent to defeat State title from a provision of the Statehood Act intended solely to give the United States the option to exercise exclusive legislative jurisdiction in military areas. This argument is unsupported by the section's stated purpose or its legislative history, and is based on unfounded speculation.

The United States argues that section 11(b) necessarily must include submerged lands because "[n]othing in section 11(b) suggests that different jurisdictional patterns were to apply within NPRA, depending on whether the lands were upland or submerged." U.S. Opp. at 71, quoting Report at 434. This speculation that Congress might not have wanted different "jurisdictional patterns" hardly constitutes an *affirmative* showing that Congress intended to defeat the State's title to equal footing doctrine lands. It also does not follow from its premises. The United States argues that (1) section 11(b) establishes exclusive federal jurisdiction over lands owned by the United States; (2) Congress must have wanted exclusive jurisdiction to apply throughout NPRA; so (3) section 11(b) must say that the United States owns all lands within the reserve. Section 11(b) does not say this, and Congress did not intend it to. It is unambiguous in its jurisdictional purpose.

The United States also is incorrect in arguing that legislation enacted shortly before the Alaska Statehood Act shows that Congress intended section 11(b) to defeat State title. U.S. Opp. at 71 n.53. The Act of July 3, 1958, Pub. L. No. 85-505, 72 Stat. 322, extended the Mineral Leasing Act to submerged lands in Alaska. The Act of September 7, 1957, Pub. L. No. 85-303, 71 Stat. 623, granted certain lands beneath tidal waters to the Territory of Alaska. In both of these Acts, Congress took affirmative steps to ensure that they would not lead to the production of oil from NPRA. This is not *affirmative* evidence that Congress intended the same

result under the Alaska Statehood Act. Indeed, if that had been Congress's intent, it would have included similar provisions in the Alaska Statehood Act. It did not. If anything, this demonstrates that Congress anticipated that the State would take title to *all* of the submerged lands in Alaska, including those in NPRA, as the legislative history shows. See Alaska's Brief at 25-29 and 45-46.

Because section 11(b) is part of the Alaska Statehood Act, Congress's intent is not the sole inquiry, for its power of exclusive jurisdiction under the Enclave Clause also depends on State consent. *Paul v. United States*, 371 U.S. 245, 264 (1963). The purpose of section 11(b) was to obtain State consent to exclusive jurisdiction over military reservations. Under sections 5 and 8(b) of the Alaska Statehood Act, Alaskans consented to the terms of the Alaska Statehood Act when they voted to accept it. 72 Stat. at 340 (section 5) and 343 (section 8). To have given their consent to a federal retention of submerged lands in NPRA, Alaskans would have had to understand that section 11(b) would defeat the new State's title to lands underlying all navigable waters in all military reservations in Alaska, including a 48 million acre reservation comprising fully thirteen percent of the State that was revoked in 1961, less than two years after statehood.²¹ Alaskans could not have divined this meaning from section 11(b), for that is not what the section says. Section 11(b) does not address title to submerged lands and does not affirmatively express an intent to defeat State title to them.²²

²¹ Public Land Order 82 ("PLO 82"), 8 Fed. Reg. 1599 (1943), withdrew, *inter alia*, the entire North Slope of Alaska and reserved the mineral therein "for use in prosecution of [World War II]." PLO 82 was revoked by Public Land Order 2215, 25 Fed. Reg. 12,599 (1960). The United States takes the position that section 11(b) defeated the State's title to all of the submerged lands within the area withdrawn by PLO 82 despite the end of the war in 1945 and repeal of PLO 82 less than two years after Alaska's admission to the Union. See *Alaska v. United States (Unpublished Opinion)*, No. A87-0450-CV (HRH) (D. Alaska 1996) (Order on State of Alaska's Motion for Partial Summary Judgment) (Appendix B to Alaska's Brief) at 4-6.

²² The United States responds to the State's point that section 11(b) does

C. An attempt by the United States to retain title to submerged lands in a statehood act would violate the equal footing doctrine.

1. Withholding sovereign rights as a condition of statehood would violate the equal footing doctrine.

The United States disputes the State's contention that Congress cannot withhold equal footing doctrine lands as a condition of statehood by arguing that if the United States can retain submerged lands for itself, then it can do so "through legislation of its choice." U.S. Opp. at 72. The United States is confusing Congress's authority as to submerged lands in *territories* and its authority as to submerged lands in *States*. Because the United States does not have authority to defeat a State's title to submerged lands after statehood, it cannot do so as a condition of statehood:

[W]hen a new state is admitted into the Union, it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original states, [and] *such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of Congressional legislation after admission.*

not address title by asserting that when the United States exercises its power of exclusive legislative jurisdiction under the Enclave Clause, U.S. Const. art. I, § 8, cl. 17, it necessarily acquires title to the property. U.S. Opp. at 69. This response begs the question. The United States does not exercise exclusive jurisdiction and thereby incidentally acquire title. The United States must have both title and consent of the State in order to be able to exercise exclusive legislative jurisdiction under the Enclave Clause. The issue here is whether section 11(b) shows that Congress affirmatively intended to defeat Alaska's equal footing doctrine entitlement and retain title for the United States.

Coyle v. Smith, 221 U.S. 559, 573 (1911) (emphasis added). The rule is the same with respect to lands underlying navigable waters. See *Corvallis Sand & Gravel Co.*, 429 U.S. at 374 (neither a provision in an Act admitting a State to the Union nor a grant from Congress to a third party after statehood is capable of defeating the State's absolute title to the beds of navigable waters).

Actions by the United States as sovereign that affect one of its territories do not implicate the equal footing doctrine as does the admission of the territory to the Union as a State. The distinction begins at statehood. Congress can dictate the capital city of a territory but cannot dictate that of a State. *Coyle*, 221 U.S. at 574. Congress can convey submerged lands in a territory in extreme circumstances, *Shively v. Bowlby*, 152 U.S. 1, 48 (1894), but cannot convey those of a State. See *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 17-19 (1935). The equal footing doctrine thus requires that all submerged lands held by the United States in trust for a future State pass at statehood.

The United States' suggestion that Congress is attentive to States' interests and might convey these lands to Alaska if it chooses, U.S. Opp. at 73, provides scant comfort. Despite universal support from all forty-eight States, it took four Congresses following *California I* to enact the Submerged Lands Act even though that Act confirmed every State's title. *Louisiana*, 363 U.S. at 6.

n.4. Alaska is the only State with an interest in the submerged lands in NPRA. For Alaska to persuade Congress to act would be far more difficult.

2. When an international duty or a public exigency requires federal retention of submerged lands, the retained interest should be limited to only those rights absolutely necessary.

Alaska argued in its opening brief that when the United States must retain submerged lands, it should be deemed to

retain only those rights absolutely necessary to meet the exigency, rather than full fee title. Alaska's Brief at 70-71. The United States characterizes this as "second guessing" Congress's judgment as to whether the national interest requires retention of full fee title. This characterization is far-fetched. Congress did not express its judgment as to any interest, much less specify that it was retaining full fee interest. Further, the issue is not the extent of Congress's power under the Property Clause,²³ as the United States frames it. U.S. Opp. at 73. Instead, the issue is the limits on that power imposed by the constitutional requirement that new States be admitted to the Union on an equal footing with all other States.

A reservation can survive statehood without forever defeating the State's title to the land subject to the reservation. Assuming that Congress clearly stated an intent to reserve submerged lands, *not* the case here, the reservation need not wholly defeat the State's title to the lands. Title can pass subject to a reservation of oil and gas, as Congress provided in section 3(d) of the Act of September 7, 1957, Pub. L. No. 85-303, 71 Stat. 623, 624. Since that title to submerged lands is "an inseparable attribute of the equal sovereignty guaranteed to it on admission" to the Union. *Louisiana*, 363 U.S. at 16 (citation omitted), the equal footing doctrine at minimum requires that title pass to the new state subject only to a limited reservation of those interests absolutely essential to the United States.²⁴

²³ U.S. Const. art. IV, § 3, cl. 2.

²⁴ Alaska could exist as a State for a thousand years, moreover. The fact that the United States might have used or intended to use some submerged lands on the date of statehood should not forever defeat the State's title to these sovereign lands. For example, if the Department of Interior in PLO 82 in 1943 (see n.21, *infra*) had reserved the minerals in the submerged lands in the 48 million acres of Alaska's North Slope for use in prosecuting World War II, defeating State title merely because the lands were reserved at statehood would be wholly arbitrary considering that World War II ended in 1945 and PLO 82 was revoked less than two years after Alaska statehood. Admission on an equal footing would be a feeble doctrine if a federal reservation the purpose of

Conclusion

For the reasons stated above, the Court should rule that (1) Alaska's submerged lands entitlement is to be determined on the basis of the 10-mile rule, (2) Dinkum Sands is an island and constitutes part of Alaska's coast line for Submerged Lands Act purposes (or, alternatively, is an island except when it is below high tide), and (3) the submerged lands in NPRA passed to Alaska at statehood.

November 1996

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which no longer existed but nonetheless remained in effect until shortly after statehood forever deprives Alaska of its sovereign lands in nearly half a million acres of the State.

5/17 (8)
No. 84, Original

**In The
Supreme Court of the United States**

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Plaintiff,

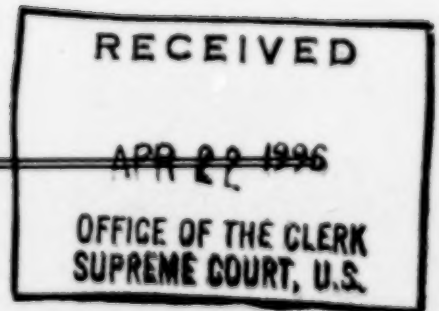
v.

STATE OF ALASKA

REPORT OF THE SPECIAL MASTER

J. KEITH MANN
Special Master
Stanford, California

March 1996



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

No. 84, Original

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF ALASKA

REPORT OF THE SPECIAL MASTER

Drew S. Days, III, Solicitor General, United States Department of Justice, for plaintiff.

Bruce Bothelo, Attorney General of Alaska, for defendant.

APPEARANCES

Louis F. Claiborne, Deputy Solicitor General and Special Assistant to the Solicitor General; Michael W. Reed and Charles W. Findlay, III, Environment and Natural Resources Division, U.S. Department of Justice, for plaintiff.

G. Thomas Koester, Assistant Attorney General of Alaska and attorney, Juneau, Alaska; John Briscoe, Washburn, Briscoe & McCarthy, San Francisco, California, for defendant.

Mason D. Morisset, Zientz, Pirtle, Morisset, Ernstoff & Chestnut, Seattle, Washington, for intervenors Inupiat Community of the Arctic Slope and Ukpeagvik Inupiat Corporation.

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D.C., for Amoco Production Co. et al. as *amici curiae*
opposing the motion for leave to intervene.

I INTRODUCTION

A. Nature of the controversy

These proceedings concern the rights to lands underlying tidal waters off the Arctic coast of Alaska. The objective is to identify the lands belonging, respectively, to the United States and the State of Alaska. Important oil and gas reserves have been discovered nearby, and the controversy arose from the desire of both sovereigns to grant leases for exploration of these offshore areas.

The rights of the United States and Alaska depend on interpretation of the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988), and related doctrine. In general, the Submerged Lands Act grants to the states the lands under tidal waters out to three miles from their coastlines, and the United States retains the rights over resources of the continental shelf beyond the three-mile limit.

Determining the rights of the parties involves two kinds of issues. One is the location of the coastline from which the three-mile belt is to be measured. The other is what lands under tidal waters, if any, are part of federal reservations along the Arctic coast and are excepted from the operation of the Submerged Lands Act.

B. Initial proceedings

On May 30, 1979, the United States moved the Court for leave to file an original bill of complaint, setting out a dispute over the right to offer lands in the Beaufort Sea for mineral leasing. Alaska expressly acquiesced. Memorandum of Nonopposition to Motion for Leave to File Complaint (June 8, 1979). The Court granted the motion on June 18, 1979. 442 U.S. 937.

The complaint stated that the submerged lands in contro-

versy, in the view of the United States, were located in the Beaufort Sea "more than three geographical miles seaward from the ordinary low-water mark and from the outer limit of inland waters along the coast of Alaska." Complaint, ¶ IV. Alaska submitted its Answer to the Complaint on September 12, 1979. At the same time, the State sought leave to file a counterclaim alleging that the United States also claimed rights along the north coast of Alaska in submerged lands under certain inland waters. Counterclaim, ¶ IV.

In particular the counterclaim sought a decree quieting Alaska's title to the offshore submerged lands lying inside the barrier islands north of the Arctic National Wildlife Range and to the submerged lands underlying the inland waters of Harrison Bay, Smith Bay and Peard Bay. The Wildlife Range (now called the Arctic National Wildlife Refuge) faces on the eastern part of the Arctic coast, between approximately 141° and 146° west longitude. The three named bays are in or adjacent to the National Petroleum Reserve-Alaska, which lies on the west side of the Arctic coast between about 151° and 162° west longitude. By comparison, the dispute that gave rise to the United States' complaint was focused primarily on the coast between 146° and 150° west longitude, around Prudhoe Bay. See figure 1.1.

The United States, while denying the claims advanced by Alaska, agreed that leave ought to be granted to the State to file its counterclaim. See Memorandum of the United States in Response to Alaska's Motion for Leave to File Counterclaim and Answer to Counterclaim (Dec. 14, 1979).

The Court appointed the Special Master on February 19, 1980, 444 U.S. 1065, and it referred the Motion for Leave to File Counterclaim to the Master on March 3, 1980, 445 U.S. 914.

C. Alaska's counterclaim

At the urging of the parties and for the reasons elaborated below, the Master determined to consider the issues tendered by the counterclaim—subject, of course, to this Court's ultimate ruling.

In the complaint the United States sought a decree declaring its rights as against Alaska "in the subsoil and seabed underlying the waters adjacent to Alaska in the area of the Beaufort Sea" and enjoining interference with those rights. Complaint at 6. The rights of the United States in the Beaufort Sea depend on the issues raised by the counterclaim as well as those raised by the complaint. Both the Arctic National Wildlife Refuge and the National Petroleum Reserve-Alaska border the Beaufort Sea, which extends along the Arctic coast eastward from Point Barrow.¹ As to the Petroleum Reserve, the State had already instituted litigation in the district court. *Alaska v. United States*, Civ. No. J75-13 (D. Alaska; renumbered No. A78-069; partial consent judgment entered Dec. 7, 1984; dismissed Nov. 26, 1986). As to the Wildlife Refuge, the State had previously informed the Department of the Interior that it intended to challenge the federal position. Memorandum in Support of Motion for Leave to File Counterclaim, at 15 n.1.

The Court's original jurisdiction to entertain the counterclaim, like the complaint, is conferred by Article III, section 2, clause 2 of the Constitution and 28 U.S.C. § 1251(b)(2) (1988). Consent to suit is to be found in 28 U.S.C. § 2409a (1988). *California v. Arizona*, 440 U.S. 59 (1979); *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273 (1982). Although the federal district courts have concurrent jurisdiction, the Court has repeatedly indicated that

¹ The Arctic coastline of the Petroleum Reserve also includes a portion facing the Chukchi Sea, from Point Barrow west to Icy Cape.

coastal boundary disputes between the United States and a state should be resolved in original suits here. *California ex rel. State Lands Comm'n v. United States*, 457 U.S. at 277 n.6; *United States v. Alaska*, 422 U.S. 184, 186 n.2 (1975); *United States v. Louisiana*, 363 U.S. 1, 85 n.143 (1960). Accordingly, it seems clear that the issues raised by the counterclaim should, sooner or later, be brought before the Court.

To avoid piecemeal litigation, the parties and the Special Master have deemed it proper to treat them now. It is true that the issues raised by the counterclaim could have been considered separately and that the Court has been willing to entertain the same case again and again until all issues are finally resolved. *E.g.*, *United States v. Louisiana*, 339 U.S. 699 (1950); *id.*, 363 U.S. 1 (1960); *id.*, 382 U.S. 288 (1965); *id.*, 394 U.S. 11 (1969); *id.*, 404 U.S. 388 (1971); *id.*, 409 U.S. 17 (1972); *id.*, 420 U.S. 529 (1975); *id.*, 422 U.S. 13 (1975); *id.*, 446 U.S. 253 (1980); *id.*, 452 U.S. 726 (1981); *id.*, 456 U.S. 865 (1982). But the burden of these cases on a crowded docket makes it desirable, when possible, to combine all maritime boundary controversies pertaining to the same area in a single proceeding. This entails granting Alaska leave to file its counterclaim.

The Master further agreed, at the parties' urging, that he might proceed to hear the counterclaim without first submitting an interim report on the motion for leave to file. The order appointing the Special Master authorized him to "fix the time and conditions for the filing of additional pleadings," to "direct subsequent proceedings," and to "submit such reports as he may deem appropriate." 444 U.S. 1065. The issues raised by the counterclaim related to the same geographic area already in controversy; they could equally well have been raised by an amended complaint; and they did not require the exercise of the Court's original jurisdic-

tion beyond familiar bounds. The Court has consistently agreed to hear federal-state disputes over submerged lands and boundaries.² And the Court has stated that its "object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

To that end, the parties have submitted and the present Report recommends resolution of all the issues that must be answered to fix the lines delimiting Alaska's submerged lands underlying tidal waters for the whole of its Arctic coast from the Canadian border to Icy Cape. Accordingly, I recommend that Alaska's Motion for Leave to File Counterclaim be granted *nunc pro tunc*.

D. The joint statements of questions presented

To identify the disputed issues with particularity, the parties submitted to the Special Master in May 1980 a Joint Statement of Questions Presented and Contentions of the Parties.³ Some ten issues were identified. After a first evidentiary hearing in July 1980, and partly as a result of expert testimony there given, it became necessary to augment the Statement of Questions Presented. A Supplement to the Joint Statement, adding three questions, was filed in September 1980. Two more issues were added by a Second Supplement to the Joint Statement, filed in July 1984.

The entire list of fifteen questions, in their original order

² See Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185, 200, 211 (1993), reprinted in 138 Proc. Am. Phil. Soc'y 195, 209, 219 (1994).

³ The original Joint Statement and the two Supplements thereto are readily identifiable in the Special Master's record as the only printed documents filed initially with him.

but without the statements of contentions, is given in Appendix A. The first question, whether Alaska should be granted leave to file its counterclaim, has already been treated above. The body of this report deals with the remaining questions, grouping them according to subject matter.

E. The motion for leave to intervene

On May 12, 1981, the Inupiat Community of the Arctic Slope and the Ukpeagvik Inupiat Corporation moved for leave to intervene in the case, claiming rights over areas in dispute between the United States and Alaska. On June 8, the Court referred the motion to the Special Master. 452 U.S. 913. Briefs opposing the motion were filed by the original parties and, as *amici curiae*, by Amoco Production Company et al., the mineral lessees of a portion of the contested area.⁴ The movants filed a reply brief. The Master heard oral argument on the intervention motion on March 26, 1982.⁵

On the Inupiat's theory of the case, their rights were to areas beyond the three-mile limit. Several of the issues in the Joint Statement and Supplement affected the location of the three-mile limit, since they involved determining the coastline from which the three miles are measured. On the issues as framed by the original parties, the Inupiat were

⁴ To permit mineral leasing during this litigation, the parties entered an interim agreement on October 26, 1979, as authorized by the Outer Continental Shelf Lands Act, § 7, 43 U.S.C. § 1336 (1988), and Alaska Stat. Ann. § 38.05.137 (1989). See Joint Statement 2 & App. I. A joint federal-state lease sale, covering the area between 146° and 150° west longitude, was held in December 1979. I am informed that oil company bonuses from the lease sale amount to very large sums, now in escrow. Their disposition awaits the final outcome of this suit.

⁵ Unlike most of the transcript, the volume for March 26, 1982, is not numbered.

aligned with the United States in seeking to maximize the area beyond the three-mile limit. Ultimately, the Inupiat's interests were adverse to the United States, and they were pursuing their claim in the federal district court. *Inupiat Community v. United States*, Civil No. A81-019 (D. Alaska, filed Jan. 19, 1981).

The Master's report on the intervention motion (Appendix B) was submitted to the Court on January 10, 1984. For the reasons there stated, the report recommended that the motion to intervene be granted, subject to several restrictions. In general, the intervention was to be limited to issues not yet submitted; the intervenors were to be restricted to supporting the position of the United States; and their participation was to continue so long as they could credibly claim an interest in the disputed areas. Report of Jan. 10, 1984, at 40-42. An order implementing these recommendations was issued on the same day (Appendix C).

At the suggestion of the Master, supported by all parties, the Court did not immediately review the report on intervention, merely ordering it filed. 465 U.S. 1018 (Feb. 21, 1984).

A final decision against the intervenors, in their separate suit against the United States, was reached in 1985. *Inupiat Community v. United States*, 548 F. Supp. 182 (D. Alaska 1982) (granting summary judgment for defendants), *aff'd*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985). By a letter of October 23, 1985, the intervenors informed the Special Master that they no longer appeared to satisfy the conditions for continued participation in the present action. Accordingly, the Master issued an order on June 3, 1986 (Appendix D), dismissing the intervenors from further participation, but not from their obligation to bear their due share of costs, as ultimately determined by the Court, for the period during which they participated.

F. Additional proceedings before the Special Master

Two of the questions presented in the Joint Statement and supplements did not require the taking of evidence. One was the question of Alaska's counterclaim (question 1). The other was subsequently settled by a joint survey and a stipulation (question 14).

By agreement, the other questions were divided into three groups for the purposes of trial. It was decided first to hear evidence and argument on the questions pertaining to the National Petroleum Reserve-Alaska (questions 7 and 8 and, as later added, question 11), the Arctic National Wildlife Refuge (questions 9 and 10), and the effect on the coastline of a pier extension at Prudhoe Bay (question 6). The evidence was heard on July 28 and 29, 1980.

Post-trial briefs on these issues were filed in November 1980 and February 1981. On March 24, 1981, however, the Court decided *Montana v. United States*, 450 U.S. 544, which Alaska suggested significantly affected the claim to tidal water bottoms within the Petroleum Reserve and the Wildlife Refuge. After a lapse of time due to the intervention proceedings, the United States and Alaska submitted a joint motion respecting the issues of these areas on October 31, 1983.

The Master granted the motion by an order of January 4, 1984, noting that the subject matter had no implications for the Inupiat petitioners for intervention. As will be explained more fully in section VIII, the order relieved the State of a concession it had made and invited supplemental briefs on the relevance of the *Montana* case. At the same time, a newly discovered map was permitted to be introduced in evidence. The supplemental briefs and reply briefs were submitted in January and February 1984. The Master heard oral argument on the same issues, together with the issue of the pier extension, on March 4, 1985. Transcript [hereafter "Tr."], vol. 17. A second set of supplemental briefs was

prompted by the Court's decision in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), and these briefs were received in September and October 1987.

The second set of evidentiary hearings was confined to a single issue from the Joint Statement, the status as an island of a formation known as Dinkum Sands (question 5). These hearings, requiring nearly three weeks, took place in July and August 1984, with the participation of the intervenors as well as the original parties. Briefs were submitted in March and May 1985. The Master heard oral argument on the Dinkum Sands issue in June 1986. Tr., vol. 24.

Finally, in May and June 1985, the last group of issues was reached for hearing: the effect of offshore islands on the legal coastline (questions 2, 3, 4, 12, and 13) and the status of southern Harrison Bay as a juridical bay (question 15). Briefing followed in the fall of 1985 and spring of 1986, and final oral arguments were held in November 1986. Tr., vol. 25. The intervenors did not participate in these proceedings.

Besides the formal hearings, the Master has made a site visit to the Prudhoe Bay area with counsel for Alaska and the United States. The visit took place on July 31 and August 1, 1980, just after the first evidentiary hearings, and included observations of Dinkum Sands (question 5) and the pier extension at Prudhoe Bay (question 6).

As the several parts of the report were completed in draft, the Master has circulated them to the representatives of the parties, under an order for confidentiality, for technical review and comment.⁶ The circulation process, which began

⁶ Rule 53(e)(5) of the Federal Rules of Civil Procedure provides: "Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions." Supreme Court Rule 17.2 states that the Federal Rules, "when their application is appropriate, may be taken as a guide to procedure in an original action in this Court."

For precedents for circulating a draft report to counsel in original

in 1989, has proved a valuable aid to accuracy. As now submitted, the Report incorporates both technical corrections and revisions reflecting the Master's own further review.

**PART ONE
ALASKA'S COASTLINE**

actions, see *Texas v. New Mexico*, Report of Special Master Charles J. Meyers, at 4 (1986), *exceptions sustained in part and overruled in part*, 482 U.S. 124 (1987); *Arizona v. California*, Report of Special Master Simon H. Rifkind (1960), at 3, *approved in part and disapproved in part*, 373 U.S. 546 (1963).

II THE LEGAL BACKGROUND

All the issues concerning the location of Alaska's coastline share the same legal background, outlined here.

It was long the received doctrine that new states, upon their admission to the Union, in general become vested with title to the beds of navigable waters within state boundaries. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Shively v. Bowlby*, 152 U.S. 1, 26-31 (1894). In 1947, the Court qualified this rule to distinguish between inland navigable waters, such as lakes and rivers, and the marginal sea traditionally claimed as a three-mile belt along the Nation's coasts. The Court explained that the precedents had involved only inland navigable waters. For the marginal sea, it held that federal rights were paramount:

[W]e are not persuaded to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern. If this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt.

United States v. California, 332 U.S. 19, 36 (1947). With the Court's decision in *California*, the right to issue oil and gas leases in coastal waters came to rest with the states if the waters qualified as inland, and otherwise with the Federal Government. The Court recognized, however, that there might be "many complexities and difficulties" in locating the exact line between inland waters, including harbors, bays, and rivers, and the marginal sea. *Id.* at 26.

The distinction between inland waters and the marginal

sea was traditionally a distinction of international law. Under that tradition, the sea is divided into inland waters, the marginal or territorial sea, and the high seas. See *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 98–99 (1985); *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 22–23 (1969); 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* 22–24 (U.S. Dep't of Commerce Pub. 10-1, 1962). With the 1947 *California* decision, the international distinction was seemingly made applicable to a domestic controversy between the Federal Government and a state.

Congress disagreed with the 1947 *California* decision. In May 1953 it enacted the Submerged Lands Act, ch. 65, 67 Stat. 29 (codified as amended at 43 U.S.C. §§ 1301–1315 (1988)), which gave the states all the United States' right, title, and interest in "lands beneath navigable waters within the boundaries of the respective States." § 3(a)–(b)(1), 43 U.S.C. § 1311(a)–(b)(1). These included lands out to a line three miles seaward from the coastline, § 2(a)(2), 43 U.S.C. § 1301(a)(2), and for most states were not to extend beyond this three-mile belt, § 2(b), 43 U.S.C. § 1301(b). The Act defined the term "coast line" to mean "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." § 2(c), 43 U.S.C. § 1301(c). The phrase "inland waters" was still left undefined.¹

The next major development was an international one. In April 1958, the first United Nations Conference on the Law of the Sea adopted a convention that did attempt to define

¹ As to lands of the continental shelf lying beyond those granted to the states, Congress confirmed federal jurisdiction and control. Submerged Lands Act § 9, 43 U.S.C. § 1302; Outer Continental Shelf Lands Act, ch. 345, § 2(a), 3, 67 Stat. 462 (Aug. 7, 1953) (codified as amended at 43 U.S.C. §§ 1331(a), 1332 (1988)).

inland waters. Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205. This Convention, which the United States signed in 1958, was approved by the Senate in 1960 and ratified by the President in 1961. The Convention took effect in 1964 upon approval by the requisite number of nations.²

In 1965, the Court handed down its second decision in the *California* litigation, this time on the meaning of "inland waters" in the Submerged Lands Act. *United States v. California*, 381 U.S. 139 (1965). The Court found first that Congress had meant to leave the definition of "inland waters" to the courts. 381 U.S. at 150–60. It noted that the 1947 opinion "clearly indicated that 'inland waters' was to have an international content," and it found that, unlike the situation in 1947, the Convention now provided "a settled international rule defining inland waters." 381 U.S. at 162, 163. The Court concluded that the meaning of "inland waters" in the Submerged Lands Act should conform to the Convention:

It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available.

² The relevant provisions of the 1958 Convention have in general been carried forward, with some additions, into a later treaty. United Nations Convention on the Law of the Sea, done Dec. 10, 1982, in *The Law of the Sea*, U.N. Sales No. E.83.V.5 (1983). See also U.N. Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Baselines, an Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, U.N. Sales No. E.88.V.5 (corrected printing 1989).

The United States did not sign the Law of the Sea Convention in 1982 because it opposed the provisions, not relevant here, on deep seabed mining. An agreement changing these provisions was reached in July 1994, and the convention and agreement have now been transmitted to the Senate for advice and consent. S. Treaty Doc. No. 39, 103d Cong., 2d Sess. (Oct. 7, 1994).

The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President, provides such definitions. We adopt them for purposes of the Submerged Lands Act. This establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations (barring an unexpected change in the rules established by the Convention). Furthermore the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome.

Id. at 165 (footnotes omitted).

Alaska was admitted to the Union in 1959, after passage of the Submerged Lands Act and negotiation of the Convention, but before the United States ratified the Convention and before the second *California* decision. The Alaska Statehood Act, approved on July 7, 1958, provided:

The Submerged Lands Act of 1953 . . . shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 339, 343 (1958), *reprinted as amended in* 48 U.S.C. note preceding § 21 (1988). Admission followed by presidential proclamation on January 3, 1959. Proclamation No. 3269, 3 C.F.R. 4 (1959-1963), *reprinted in* 48 U.S.C. note preceding § 21, at 15 (1988).³

³ Late in 1988 President Reagan issued a proclamation extending the territorial sea to twelve miles. Proclamation No. 5928, 3 C.F.R. 547 (1988), *reprinted in* 43 U.S.C. § 1331 note (1988). The change appears not to affect the federal-state rights at issue in this case, for the Submerged Lands Act grant is not framed in terms of the territorial sea, and the proclamation itself states: "Nothing in this Proclamation . . . extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom . . ." *Id.*

III

THE EFFECT OF ISLANDS ON THE COASTLINE

When a new state enters the Union, it ordinarily takes title to lands under its inland navigable waters. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). In addition, Congress has granted certain submerged lands outside of inland navigable waters to the states. Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-1315 (1988)). For purposes of both the *Pollard* doctrine and the Submerged Lands Act, the extent of a state's rights may be affected by the presence of islands offshore.

In this part of the case, the dispute is over the proper method for determining Alaska's rights where there are islands. In questions 2, 3, and 4 of the Joint Statement,¹ the issue is the effect of near-shore islands in the so-called leased area of Alaska's Arctic coast. This stretch of the coastline lies between 146° and 150° west longitude, in the Beaufort Sea; it includes Prudhoe Bay. As to oil and gas leasing of the disputed parts of the area, *see supra* section I, note 4.

Figure 1.1 shows the leased area on a small scale. The National Petroleum Reserve-Alaska is to the west, and the Arctic National Wildlife Refuge is to the east.

Questions 2 and 3 both have to do with methods for locating the dividing line between inland waters and the marginal sea beyond. The question of the dividing line also arises in the areas of the Petroleum Reserve and the Wildlife Refuge. Questions 12 and 13 extend questions 2 and 3 to the entire coast, from Icy Cape to the Canadian border. *See Supplement to Joint Statement.*²

Question 4 concerns another theory of the effect of off-

¹ The language of the questions will be given in section B, *infra*.

² For the Petroleum Reserve and the Wildlife Refuge, the rights of the parties depend also on the questions to be considered in part 2.

shore islands, this one not depending on the seaward limit of inland waters but rather on the particular configuration of islands. Because configurations of the type relevant to question 4 exist only in the leased area, there is no further question extending question 4 geographically.

The Special Master heard evidence on questions 2, 3, 4, 12, and 13 on May 28 through June 4, 1985. The parties filed post-hearing briefs and reply briefs in the fall of 1985 and spring of 1986.³ Final argument was held on November 20, 1986.

A. The United States' position

A positive answer to any of questions 2, 3, 4, 12, and 13 would be an answer in favor of Alaska. The United States' position, which all the questions attack, must be understood as background. I begin with that position and turn later to Alaska's various challenges to it. On the United States' view, all the questions should be answered no.

The United States holds a single theory about how the sources reviewed in section II should be applied to the north

³ In this section of the report, the briefs will be referred to as AB, USB, ARB, and USB. The corresponding full titles are as follows: Alaska's Post-Trial Brief on Questions 2, 3, 4, 12, 13 and 15 of the Joint Statement of Questions Presented and Contentions of the Parties; Post-Trial Memorandum of the United States on Issues 2, 3, 4, 12, 13 and 15; Alaska's Reply Brief on Questions 2, 3, 4, 12, 13 and 15; Post-Trial Rebuttal Memorandum of the United States on Issues 2, 3, 4, 12, 13 and 15. Question 15 is treated separately in section IV, *infra*.

Alaska also presented, on the opening date of trial, a 264-page document titled "Chronological Outline of Relevant Events in American Foreign Policy with Respect to the Delimitation of the Territorial Sea and Other Maritime Zones, 1782-1985." A revised version of the chronology dated June 27, 1995, has been received with consent. A timeline chart to accompany the chronology, revised from a chart originally submitted with Alaska's Reply Brief, was submitted on October 26, 1995.

coast of Alaska. It starts from the Alaska Statehood Act, which applies the Submerged Lands Act to Alaska. By the Submerged Lands Act, in the United States' view, Alaska received submerged lands out to three miles from its coastline. The location of the coastline, under the Submerged Lands Act, depends on the seaward limit of Alaska's inland waters. The identification of Alaska's inland waters, under the 1965 *California* decision, depends on the 1958 Convention.

It now becomes important to review the Convention's definition of inland waters. The Convention defines the dividing line between inland waters (or "internal waters") and the marginal sea (or "territorial sea") in terms of a baseline:

Article 5

1. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

Normally the baseline is the low-water line along the coast:

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Respecting the baseline for islands, the Convention simply provides:

Article 10

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

With a "normal baseline" under Article 3, this means that each island has its own belt of territorial sea.

The territorial sea is measured outward from the baseline, for a distance determined by each nation for itself. The

United States has traditionally claimed three miles—the same width as the standard grant to the states under the Submerged Lands Act. The outer limit of the territorial sea (given the baseline and the width) is constructed by a method called the method of arcs of circles. Article 6 of the Convention defines the result of the method: “The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.”⁴

Figure 3.1 shows the normal baseline and the three-mile belt in the presence of coastal islands. The figure is a schematic representation of the United States’ position as to Alaska’s rights in submerged lands. It also illustrates the consequences to which Alaska objects. If offshore islands each have independent three-mile belts, they may create enclaves of federal lands—that is, lands that are more than three miles from any upland but which are wholly surrounded by lands within the three-mile belt. There may also be pockets or cul-de-sacs of federal lands—that is, areas that are largely, though not entirely, so surrounded.⁵

⁴ To envision the working of the method, one may imagine a circle, whose radius is the width of the territorial sea, rolling along the seaward side of the baseline. The outer limit of the territorial sea will be the path traced by the center of the circle. See 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* 169–72 (U.S. Dep’t of Commerce Pub. 10-1, 1962).

⁵ The parties have often referred to these as enclaves or cul-de-sacs of high seas. Since the territorial sea was extended to twelve miles, *supra* section II, note 3, that designation is no longer accurate. It does remain accurate to call the disputed areas enclaves or cul-de-sacs of outer continental shelf lands. See *supra* section II, note 1.

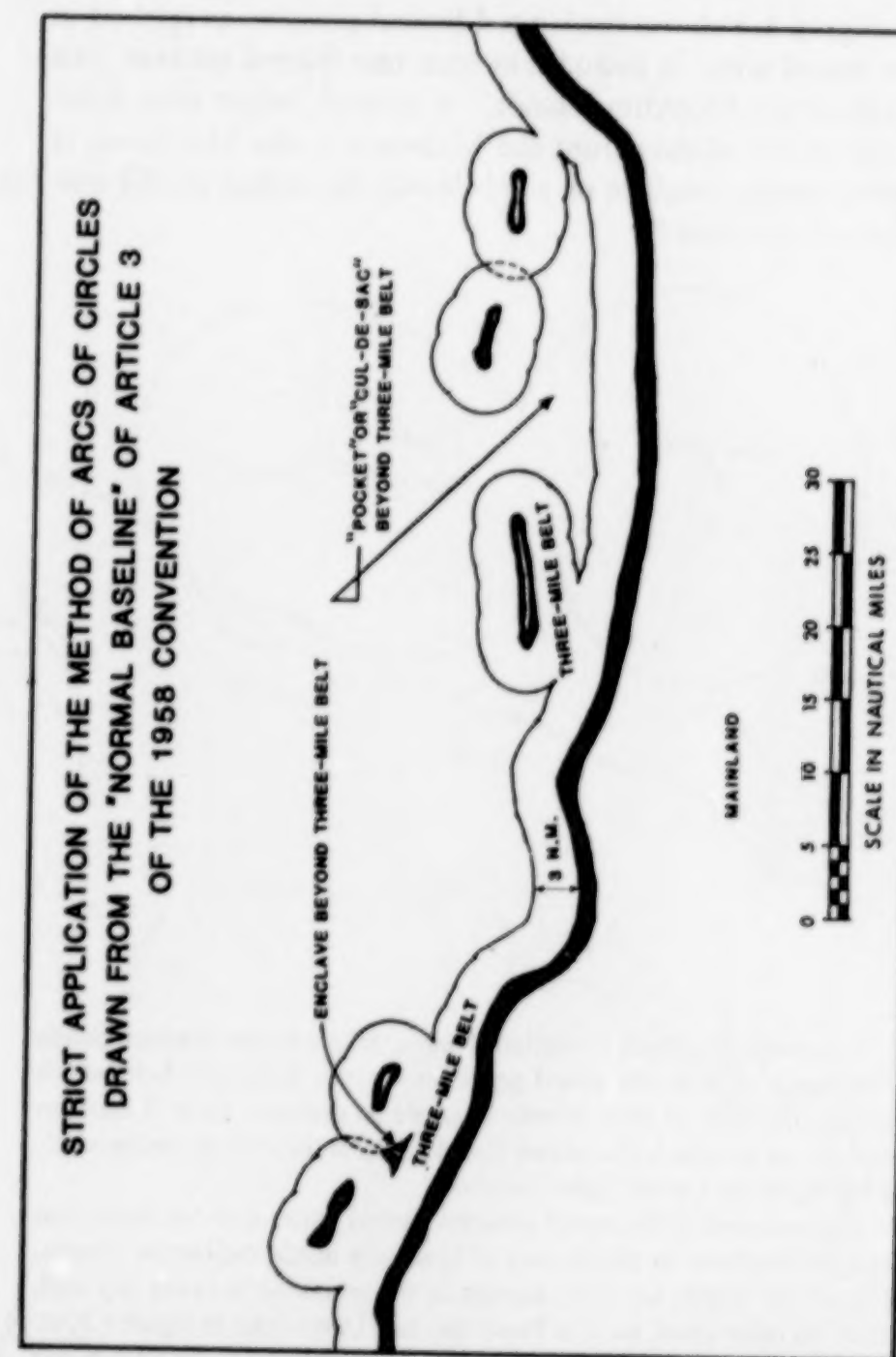
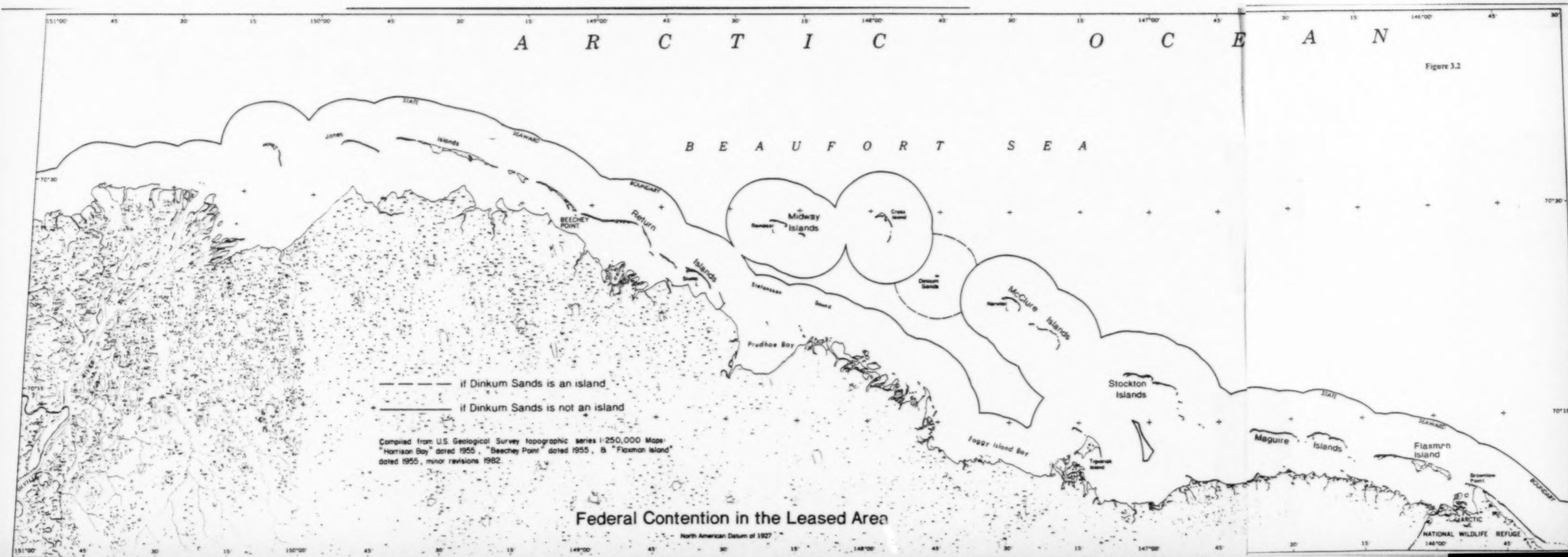


Figure 3.1. The normal baseline and the three-mile belt in the presence of islands.

Figure 3.2 shows the United States' position as applied in the leased area. It includes at least one federal enclave, just south of the Stockton Islands. A second, larger area, landward of the islands from the Midways to the McClures, is either another enclave or a cul-de-sac depending on the outcome of question 5.⁶

⁶ Question 5, treated in section V *infra*, asks whether Dinkum Sands is an island. If it is, the island generates its own three-mile belt, which overlaps the belts of other islands to create an enclave. Even if Dinkum Sands is not an island, the islands that do exist in the vicinity create a cul-de-sac under the United States' position.

East and west of the leased area, the United States does not assert that there are enclaves or cul-de-sacs of high seas inside the barrier islands. Most of the islands are close enough to the mainland to avoid any such result. In other cases, such as Peard Bay and Dease Inlet in figure 1.1, no question of enclaves arises because the waters behind the islands are agreed to form a bay.



B. Alaska's position

Alaska contests the United States' position at several points. Its basic objection, however, is to the claim that there are federal submerged lands that are wholly or largely surrounded by state-owned submerged lands.

The objection is grounded in history. The most salient feature of the history, according to Alaska, is that the United States never claimed there were high seas in such areas until well after Alaska became a state. *E.g.*, Tr. 3532. In Alaska's view, it gained the rights to the disputed lands at statehood, and these rights could not later be taken away. *E.g.*, Tr. 3528-29, 3585-86.

Alaska has proposed three other methods, as alternatives to the United States' method, by which to draw the dividing line between state and federal lands offshore. The first method corresponds to questions 2 and 12 of the Joint Statement; the second method, to questions 3 and 13; and the third method, to question 4. *See* Tr. 2521-25. The methods are introduced briefly below. The legal theories offered in support of the several methods will be treated in later sections.

1. Questions 2 and 12: straight baselines

The Convention provides an alternative to the normal baseline described in section A. Questions 2 and 12 of the Joint Statement refer to this alternate method:

Question 2: Should the extent of Alaska's submerged lands in the leased area be determined on the basis of "straight baselines"?

Question 12: Should the extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the "leased area," be determined on the basis of "straight baselines"?

The straight baseline provisions appear in Article 4 of the Convention:

Article 4

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

....

6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given.

Figure 3.3 illustrates the use of Article 4 baselines for a fringe of islands near the coast, using the same hypothetical coastline as figure 3.1. Straight baselines join the islands; there is no fixed limit on their length. Waters on the landward side of the baselines become inland waters. Extending outward from the straight baselines, which form the seaward limit of inland waters, are both the territorial sea and the three-mile belt granted by the Submerged Lands Act. With a three-mile territorial sea, these coincide.

Alaska proposes the use of Article 4 baselines along the Arctic coast subject to a limitation that no straight baseline be more than ten miles long. For the hypothetical coastline of figures 3.1 and 3.3, the result would be as shown in figure 3.5 (page 31). In the areas actually in dispute, the distances between adjacent islands are in fact all less than ten miles. Figure 3.4 shows, for the leased area, the approximate

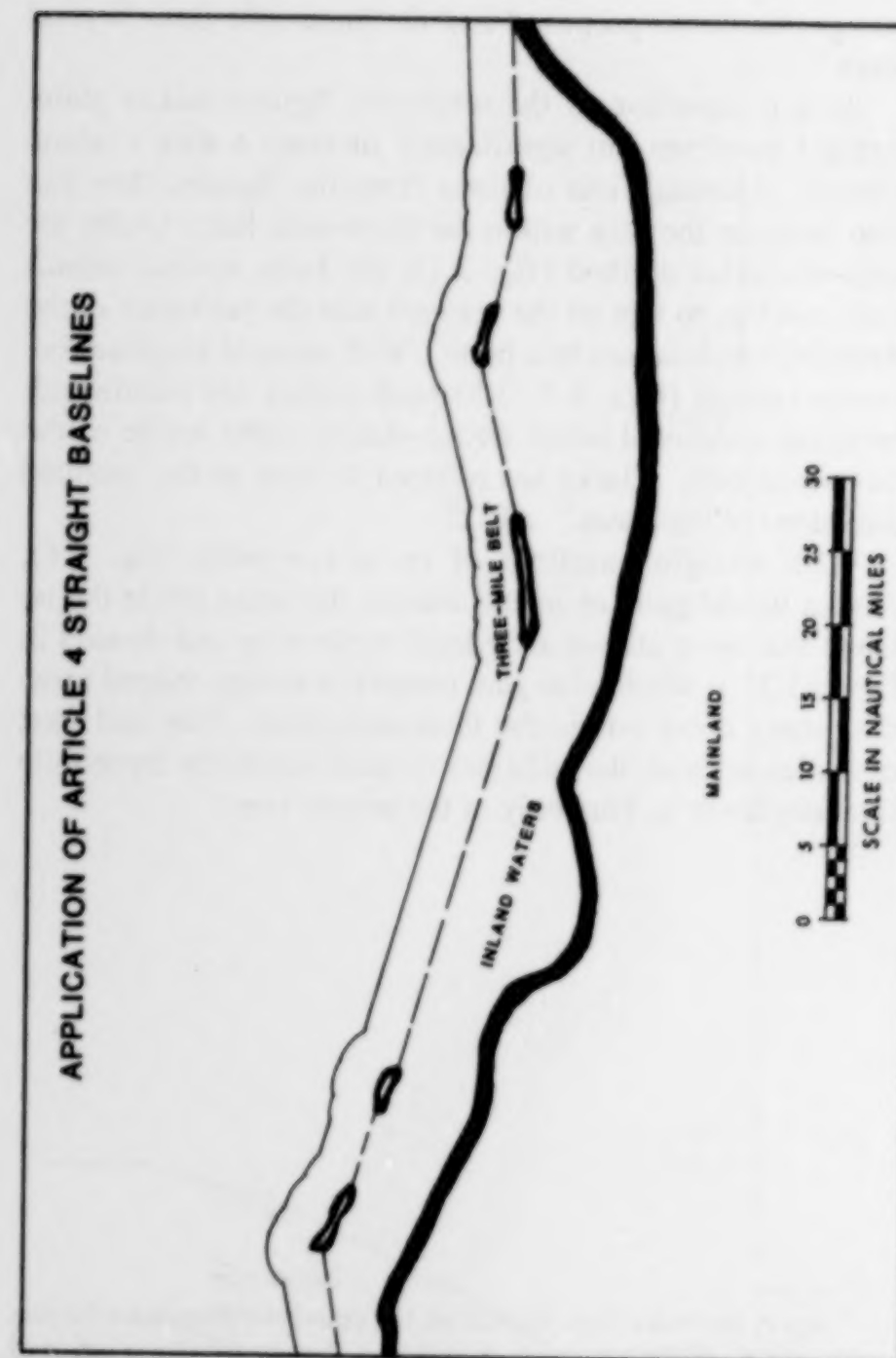


Figure 3.3. Article 4 straight baselines. The baselines shown are not limited by the distance between islands. For the effect of limiting Article 4 baselines to ten miles, as Alaska proposes, see figure 3.5.

straight baselines proposed and the three-mile limit beyond them.⁷

As a comparison of the schematic figures makes plain, straight baselines can significantly increase a state's inland waters. Although less obvious from the figures, they can also increase the area within the three-mile belt. Under the arcs-of-circles method (fig. 3.1), the belts around islands may overlap, so that on the seaward side the perimeter of the three-mile belt comes to a point. With straight baselines between islands (figs. 3.3, 3.5) such points are eliminated, bringing additional small wedge-shaped areas inside of the three-mile belt. Alaska has referred to these as the "pointed intrusions of high seas." AB 27.

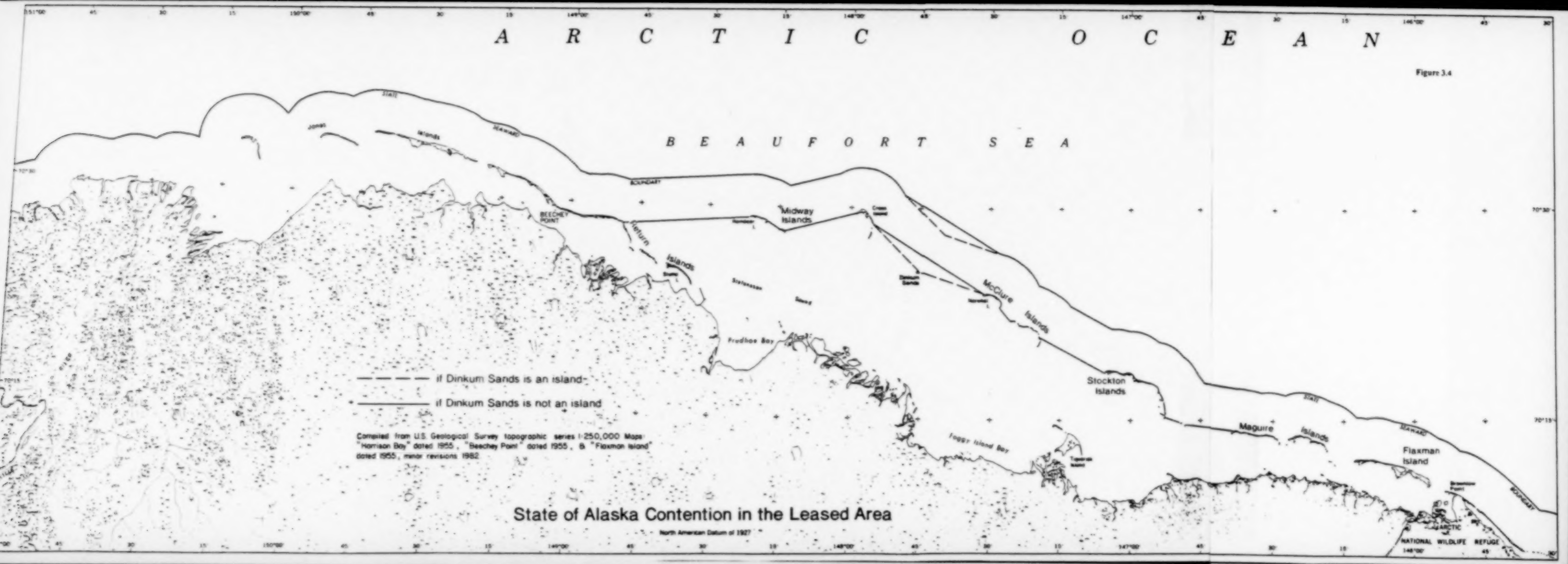
With straight baselines of up to ten miles (fig. 3.4), Alaska would gain, as inland waters, the areas inside the islands that were shown as federal enclaves or cul-de-sacs in figure 3.2. It would also gain numerous wedge-shaped areas that newly come within the three-mile limit. East and west of the leased area, the additions to lands inside the three-mile limit are fewer and are only of the second type.

⁷ Again the exact lines depend on the outcome of question 5. See *supra* note 6. If Dinkum Sands is an island, then straight lines join it to its neighbors on each side. Otherwise, one longer line (about 9.2 nautical miles) joins the neighbors directly. See AB 29.

A R C T I C O C E A N

Figure 3.4

B E A U F O R T S E A



2. Questions 3 and 13: the ten-mile rule

The previous questions, questions 2 and 12, asked whether the extent of Alaska's offshore submerged lands should be delimited by Article 4 straight baselines up to ten miles long. Questions 3 and 13 assume that Article 4 baselines are not to be used. They ask whether the submerged lands between the shore and the barrier islands are inland waters even without Article 4:

Question 3: Do the submerged lands between the mainland and the barrier islands in the leased area (including areas more than three miles from any upland) belong to Alaska on the ground that they underlie inland waters?

Question 13: Should the extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the "leased area," be determined on the basis that the waters between the mainland and the barrier islands are inland waters, even if the "straight baseline" contention is not accepted?

Associated with questions 3 and 13 is a method for delimiting inland waters behind fringing islands known as the ten-mile rule. The Court found in 1985 that such a rule has indeed been the policy of the United States:

Prior to its ratification of the Convention on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles. This 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903.

United States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93, 106-07 (1985) (opinion by Blackmun, J.). In making this finding, the Court drew on the find-

ings of its Special Master. *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, Report of Special Master Walter P. Armstrong, Jr., at 5–6, 53–54 (1984) (U.S. Ex. 85-503).⁸

The parties agree that the historic policy of the United States on enclosing inland waters is a question of fact, Tr. 3522, 3565, and Alaska does not seek to invoke collateral estoppel against the United States, Tr. 3521–24 (citing *United States v. Mendoza*, 464 U.S. 154 (1984)). Accordingly, the question of the ten-mile rule—its existence, its scope, and its life-span—has been treated as open for fresh consideration in these proceedings.

Figure 3.5 illustrates the ten-mile rule along the same fictitious coastline as the other figures. The lines shown differ from the Article 4 straight baselines of figure 3.3 only because of the length limitation. Along Alaska's north coast, where none of the islands are as much as ten miles apart, this difference does not exist. See Tr. 2925; AB 29; ARB 13 n.3. Hence figure 3.4 serves again to show the actual lines proposed.

3. Question 4: assimilation and simplification

Should Alaska prevail on question 2 or question 3, the disputed parts of the leased area become inland waters and belong to the State. Question 4 becomes significant if the United States prevails on both questions 2 and 3. It asks whether the disputed areas belong to Alaska even if the waters are not inland:

Question 4: If they do not underlie inland waters of Alaska, do the submerged lands between the mainland and the barrier islands in the leased area which are more

⁸ Reprinted in *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases, 1949–1987* (Michael W. Reed, G. Thomas Koester, & John Briscoe eds., 1991), at 349.

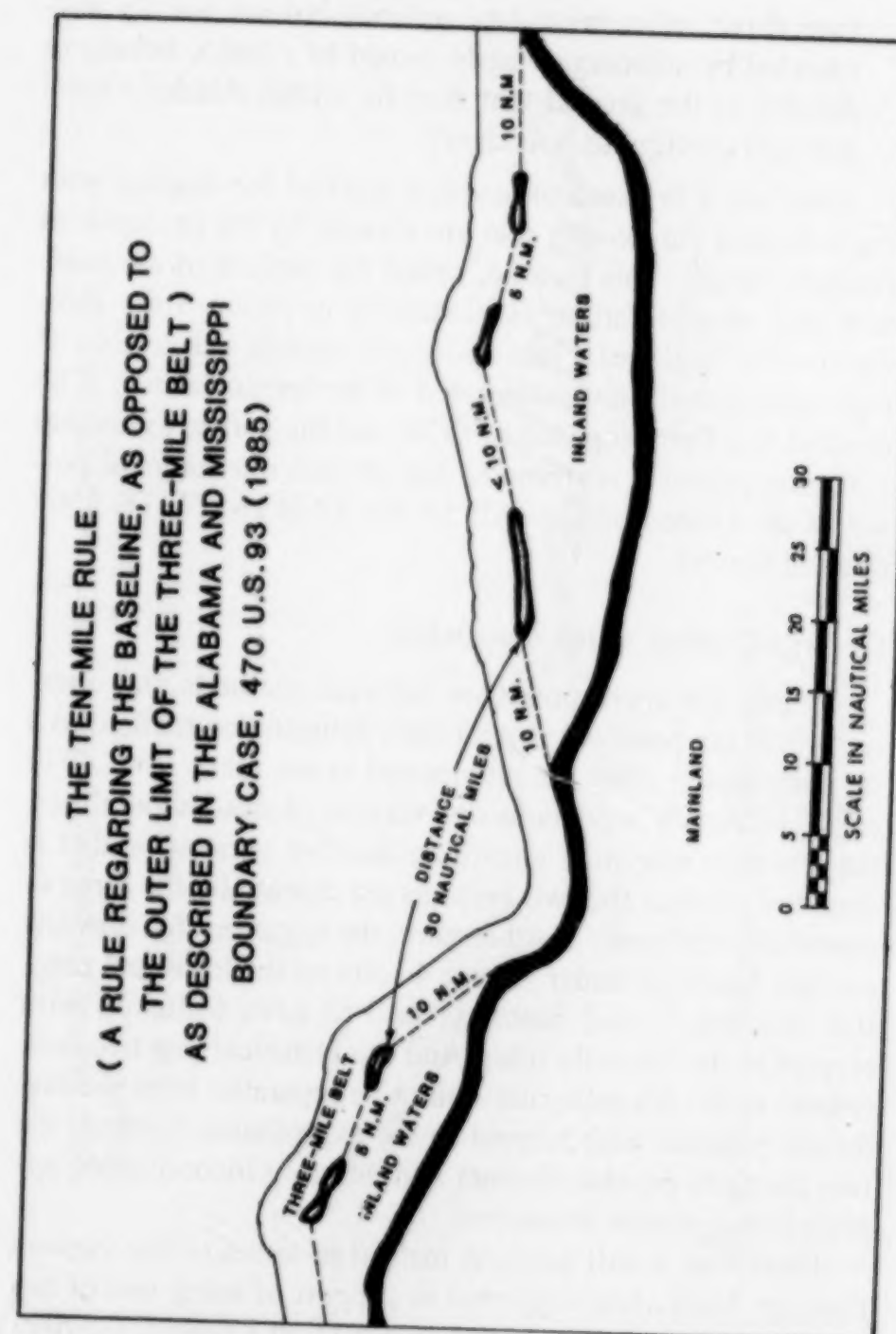


Figure 3.5. The ten-mile rule.

than three miles from any upland, but are totally surrounded by submerged lands owned by Alaska, belong to Alaska on the ground that they lie within Alaska's most seaward contiguous boundary?

Question 4 is based on another method for dealing with enclaves and cul-de-sacs that are created by the presence of coastal islands. This method, called the method of assimilation and simplification, is illustrated in figure 3.6. Here enclaves of high seas, and optionally certain cul-de-sacs of high seas as well, are assimilated to the territorial sea. The method was first proposed in 1930, and the parties agree that for some period it represented the official international policy of the United States. AB 53-54; USB 26-27; Tr. 3567 (United States).

C. Organization of the discussion

Despite the correspondence between methods and questions, it is not practical to treat each delimitation method as a separate topic. They are interrelated in too many ways. For example, Article 4 contains one version of straight baselines; the ten-mile rule may constitute another version; and it is disputed whether the two versions are essentially the same or essentially different. Furthermore, the argument for drawing straight baselines under Article 4 rests on the historical practice that the United States is said to have followed with respect to the ten-mile rule. And the historical practice with respect to the ten-mile rule cannot be separated from the historical practice with respect to the assimilation method: the two methods provide distinct and possibly incompatible approaches to similar situations.

Therefore, I will proceed instead in terms of the various theories Alaska has suggested in support of using one or another of the methods. In the next section I consider certain points of statutory interpretation relating to the Alaska

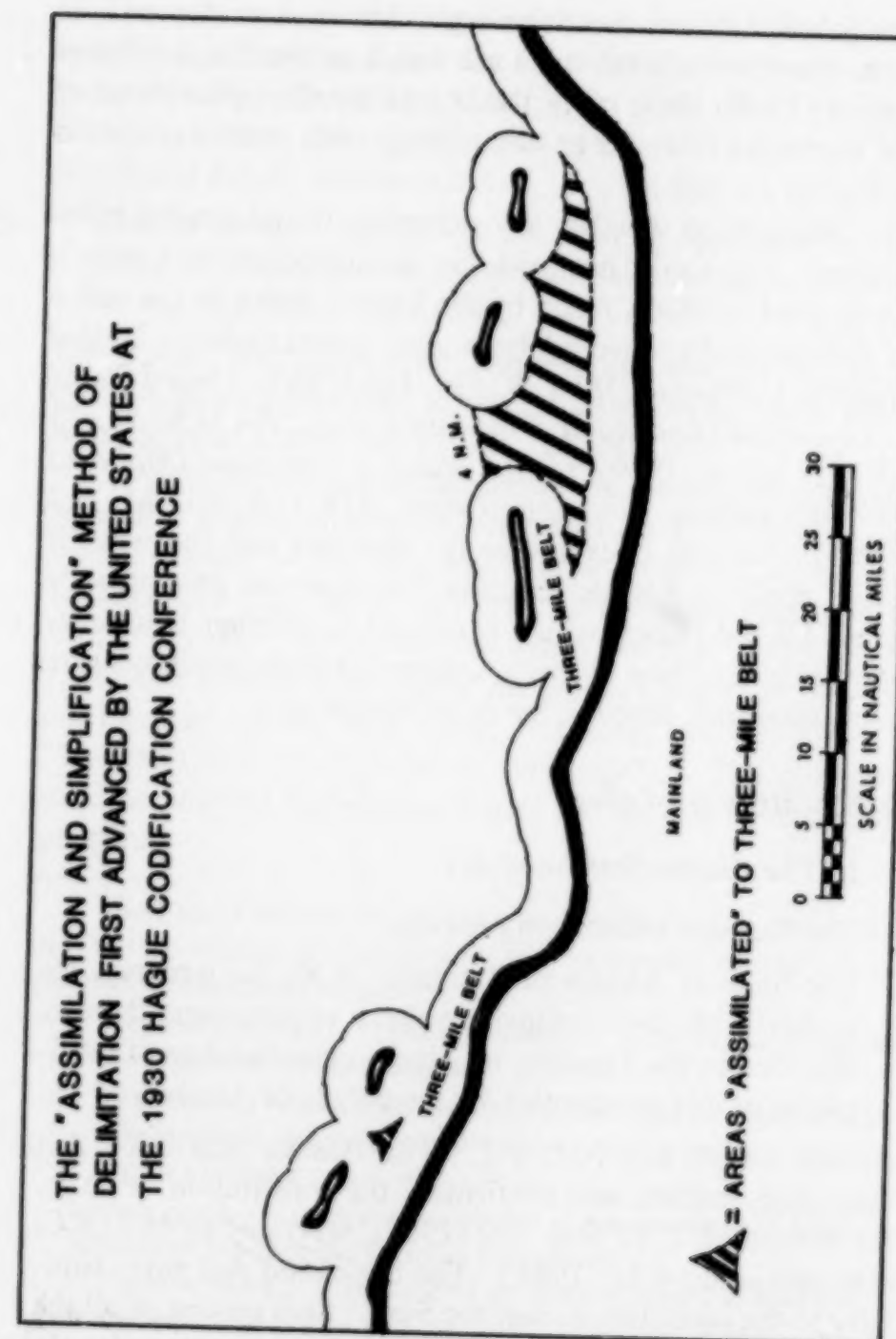


Figure 3.6. The method of assimilation and simplification.

Statehood Act and the Submerged Lands Act. I conclude there that the general rules are much as the United States claims. Under these rules, the normal baseline provisions of the Convention would be controlling, with results as shown in figures 3.1 and 3.2.

I then turn to whether any exception to the general rules applies. The Court has said that a contraction of a state's recognized territory, made by the United States in the name of foreign policy, would be highly questionable. *United States v. California*, 381 U.S. 139, 168 (1965); *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 73 n.97, 77 n.104 (1969); *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 111-12 (1985). Section E examines the doctrine and the ways it might apply to Alaska. Section F reviews the past practice of the United States, which is critical to whether a contraction has taken place. Finally section G recommends answers to the questions posed in the Joint Statement.

D. Statutory provisions

1. *The Alaska Statehood Act*

The Alaska Constitution provides:

The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, included in the Territory of Alaska upon the date of ratification of this constitution by the people of Alaska.

Alaska Const. art. XII, § 1. The Alaska Statehood Act "accepted, ratified, and confirmed" the constitution. Pub. L. No. 85-508, § 1, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C. note preceding § 21 (1988). The Statehood Act says, similarly to the constitution, that the State "shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." *Id.*, § 2.

The parties agree that the description of the State's territory in the Statehood Act does not itself convey any submerged lands. Tr. 3510 (Alaska); Tr. 3542, 3545 (United States). Rather, submerged lands were provided for in the Statehood Act by section 6(m):

The Submerged Lands Act . . . shall be applicable to the State of Alaska and the State shall have the same rights as do existing States thereunder.

The parties also agree that Congress intended, in this submerged lands provision, to treat Alaska on an equal basis with the other states. AB 11, 70, 123-24; USB 7, 68-69.

On these agreed points the parties are clearly correct. See generally *Alaska Statehood: Hearings on S. 50 Before the Senate Comm. on Interior and Insular Affairs*, 83rd Cong., 2d Sess. 219-26, 280-82 (1954) ("1954 Senate Hearings"); *Hawaii-Alaska Statehood: Hearings on H.R. 2535, H.R. 2536, and Related Bills Before the House Comm. on Interior and Insular Affairs*, 84th Cong., 1st Sess. 114-19, 246-50, 270-76 (1955) ("1955 House Hearings").⁹ The question remains how the Submerged Lands Act applies to Alaska in practice.

⁹ Members of the Senate committee took special care to distinguish between the location of the boundary and the question of title to submerged lands inside the boundary:

Senator CORDON. . . . Senator Daniel, . . . [t]he second paragraph of the suggested substitute language . . . reads:

The State of Alaska shall consist of all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska.

In your opinion, will that language give to the new State of Alaska a political or State boundary 3 miles from shore?

Senator DANIEL. It would give the State of Alaska at least that, I would say.

. . . .

Senator DANIEL. Your question related strictly to the boundaries

2. *The Submerged Lands Act*

The Submerged Lands Act provides that the states are entitled to "the lands beneath navigable waters within the boundaries of the respective States." § 3(a), 43 U.S.C. § 1311(a). The Act defines "lands beneath navigable waters" to include

all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles

§ 2(a)(2), 43 U.S.C. § 1301(a)(2). By going up to the line of mean high tide, this section includes the tidelands. By going seaward three miles from the coastline, it includes the traditional belt of territorial sea. By going beyond the three-mile belt to a state's boundary when it entered the Union, it also appears to grant to the states certain areas that the United States has considered high seas.

Somewhat redundantly, the Act also defines the word "boundaries" to include "the seaward boundaries of a State . . . as they existed at the time such State became a member

of the new State, did it not, Senator?

Senator CORDON. Yes, the boundary line.

Senator DANIEL. You are not asking about title to the submerged lands?

Senator CORDON. No. That we will have to take care of as we did in Hawaii, with a special provision making the provisions of the Submerged Lands Act applicable. I am now simply talking about the boundaries of the State.

1954 Senate Hearings at 280.

of the Union" § 2(b), 43 U.S.C. § 1301(b). Both definitions are limited by the following language:

but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico

§ 2(b), 43 U.S.C. § 1301(b).

The Court has stated that the Act

makes two entirely separate types of grants of submerged lands to the States. The first is an *unconditional* grant allowing each coastal State to claim a seaward boundary out to a line three geographical miles distant from its "coast line." The second is a grant *conditioned* upon a State's prior history.

United States v. Louisiana, 389 U.S. 155, 156 (1967) (concerning the effect of artificial jetties off the Gulf Coast of Texas).

Alaska's claims under the Submerged Lands Act are framed in terms of this distinction between a conditional grant (out to the state's historic seaward boundaries) and an unconditional grant (out to three miles). AB 116, 128, 131; Tr. 3486-87. Alaska has said that its contentions regarding the ten-mile rule (questions 3 and 13) and the assimilation method (question 4) are directed only to the conditional grant. AB 2-3.

a. *The conditional grant*

Alaska argues that Congress, in writing the Statehood Act, gave careful consideration to its seaward boundaries, that it defined the boundaries in terms of the territorial sea then claimed by the United States, and that it was aware of

the relationship to the Submerged Lands Act in making this definition. Thus Alaska says, "Congress intended Alaska's Submerged Lands Act grant to be co-extensive with the territorial sea claimed by the United States at the time of Alaska's admission." AB 119.

These points are basically correct. See 1954 Senate Hearings, *supra* page 35; 1955 House Hearings, *supra* page 35. However, Congress did not lay down a line marking Alaska's seaward boundary or the outer limit of the territorial sea. It clearly understood that the territorial sea was measured outward from the coastline. See, e.g., 1955 House Hearings, *supra*, at 247-48, 272-73 (remarks of committee chairman Engle). And since the width of the territorial sea was three miles, the language of the Submerged Lands Act defining Alaska's entitlement would have been (at least primarily) the language italicized:

all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles

§ 2(a)(2), 43 U.S.C. § 1301(a)(2) (emphasis added).¹⁰ Accordingly, the central question is the location of Alaska's coastline.

¹⁰ Under one of Alaska's suggested delimitation methods, the assimilation method, the territorial sea could in some places be more than three miles from any point on the baseline. See figure 3.6. Only if that method was used would the later language of the section, referring to a boundary extending "seaward . . . beyond three geographical miles," come into play. In that case, there would be a further question whether section 2(b)

b. *The definition of "coast line"*

The Submerged Lands Act defines the coastline as follows:

The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters

§ 2(c), 43 U.S.C. § 1301(c).

Alaska's next contentions go to the application of this definition where the mainland is fringed by near-shore, closely spaced barrier islands. Alaska says that the coastline in that case is formed in part by lines joining the barrier islands. The United States says that the coastline consists of the line of ordinary low water along the mainland and around each island individually. For this result it relies on the 1965 *California* case, which held that the meaning of "inland waters" in the Submerged Lands Act should conform to the 1958 Convention, and on subsequent decisions of the Court. Alaska makes two replies, as follows.

(1) *The Douglas amendment*

First, Alaska argues that Congress rejected the United States' interpretation of "coast line" at the time it passed the Submerged Lands Act. It points to the Senate floor debate. Senator Paul Douglas of Illinois offered an amendment that would have defined "coast line" in just the way the United States now argues for:

The term "coast line" means the line of ordinary low water along that portion of the coast of the main continent

of the Act, quoted *supra* page 37, should be read as limiting grants into the Arctic Ocean in the same way as grants into the Atlantic and Pacific.

The status of the assimilation method is discussed in sections F(3)(b) and F(5)(d)(2), below.

which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and in the case of any island seaward of such coast, means the line of ordinary low water around such island.

99 Cong. Rec. 4240 (1953).¹¹ The purpose, Senator Douglas indicated, was to foreclose expansive state claims where there were "remote islands" lying off the coast, as in California. Senator Long of Louisiana objected that the amendment would cover all offshore islands, even nearby ones such as the Chandeleur Islands fringing the Louisiana coast, where it was generally agreed that the intervening waters were inland waters. The amendment was defeated. 99 Cong. Rec. 4240-43 (1953).

Alaska concludes that to apply the normal baseline provisions of the Convention to near-shore island fringes is contrary to the intent of Congress. It suggests that the Court's 1965 decision in *United States v. California* pertained only to remote islands like those off the California coast.

I agree with the United States that Alaska's argument comes too late. In *California* the Court found, after a thorough review of just this history, that Congress had no intent as to the definition of inland waters but meant to leave its interpretation to the courts. It read the rejection of the Douglas amendment as merely rejecting the idea that Congress should adopt its own definition. 381 U.S. at 150-60. After the *California* decision adopted the Convention's definition for purposes of the Submerged Lands Act, 381 U.S. at 161-67, the Court went on in the *Louisiana Boundary Case* to apply that same definition to near-shore island fringes.¹²

¹¹ For the committee version of the definition, which Senator Douglas sought to amend, see S. Rep. No. 133, 83d Cong., 1st Sess. 2 (1953). The committee version was the same as that ultimately enacted.

¹² Except, as Alaska emphasizes, for Chandeleur and Breton Sounds, which the United States had conceded to belong to Louisiana and for a

United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 11, 66-73 (1969); *id.*, Report of Special Master Walter P. Armstrong, Jr., at 49-52 (1974) (U.S. Ex. 85-415), *reprinted in* Reed et al., *supra* note 8, at 181, and in 59 I.L.R. 249 (ruling that Caillou Bay was not inland water); *id.*, 420 U.S. 529 (1975) (accepting the Master's report).

(2) *The meaning of "open sea"*

Second, Alaska argues that the definition of "coast line" in the Submerged Lands Act has two parts. The coastline consists of (1) "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea" and (2) "the line marking the seaward limit of inland waters." § 2(c), 43 U.S.C. § 1301(c). The Court has ruled on the part concerning inland waters, Alaska says, but it has not determined what Congress meant by the other part of the definition, "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea."

Furthermore, Alaska argues, Congress intended the phrase "in direct contact with the open sea" to include only the seaward side of near-shore barrier islands. It relies particularly on remarks of Senator Holland, in opposition to the Douglas amendment (*supra* page 39), that "the coastline of Louisiana was along the outer line of the great bow of islands which comprise the Chandeleur Islands" and that under the committee's bill "there would be no question about the outer rim of the Chandeleur Islands being that portion of the coast which is in contact with the open sea." 99 Cong. Rec. 4242 (1953). Alaska would draw its own coastline similarly, along the outer rim of its barrier islands. In addition to Senator Holland's statement, Alaska refers to (1) the ordinary meaning of "open sea," (2) contemporaneous administrative

time described as inland water. I will consider the implications of that concession later.

interpretations of the Submerged Lands Act, (3) the complementary language of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a) (1988), which applies to lands "lying seaward and outside of" the lands conveyed to the State under the Submerged Lands Act, and (4) the undesirability of enclaves and pockets of high seas.

On first examination Alaska's position appears plausible. I conclude, however, that Alaska's interpretation of "coast line" is inconsistent with the 1965 *California* decision. First, the Court there took "open sea" simply to mean any waters other than inland waters:

It is precisely that problem of defining what constitutes open sea and what constitutes inland waters which we must decide in the present case.

.... [T]he Convention on the Territorial Sea and the Contiguous Zone, to which we became a party in 1961, now establishes rules for separating the open sea from inland waters.

381 U.S. at 162 n.25. When it made this remark, the Court was specifically concerned with the meaning of "inland waters" in the Submerged Lands Act, *see id.* at 149, 161, and it was not considering the Act's usage of "open sea." The Court did also indicate, however, that it was adopting the Convention's definitions for all purposes concerning delimitation of the coastline. Thus it said in *California* that its action "establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations," *id.* at 165. Later the Court was even more explicit:

The decision in the second *California* case . . . held that Congress had left it up to this Court to define the "coast line" from which the standard three-mile grant was to be measured.

United States v. Louisiana, 389 U.S. 155, 158 (1967).

Second, even if one reads *California* as passing only on the definition of inland waters, Alaska's position is still inconsistent with the decision. The coastline Alaska contends for would consist not only of the low-water line along the seaward side of the barrier islands but also of straight lines connecting the islands. In Alaska's own view, the latter would become the seaward limit of inland waters. Tr. 3514. The State's position would thus create two kinds of inland waters: those that qualify as inland under the Convention (without using Article 4) and those resulting from the interpretation of "open sea" in the Submerged Lands Act. To recognize the second class as inland waters would contravene *California*'s holding that the definition of inland waters should conform to the 1958 Convention.

This conclusion is supported by the testimony of expert witnesses for both sides. Alaska's witness on the subject was Dr. J.R. Victor Prescott, a reader in geography at the University of Melbourne (since promoted to full professor). Professor Prescott testified initially that the mainland shore inside the barrier islands was not in direct contact with the open sea, Tr. 2926-27, 2931-36, 2951, but he later changed his position and said that a coast facing the open sea is one that does not face inland waters. Tr. 2953, 2975-79, 2985-87. Dr. Robert Smith, Chief of the International Boundary and Resource Division in the Office of the Geographer, Department of State, testified for the United States in support of the latter position. Tr. 3202, 3276-79.

Alaska suggests that its reading of "open sea" can be reconciled with *California* by considering the lines joining the islands to be straight baselines, which Article 4 of the Convention authorizes. Tr. 3525. The conditions for using straight baselines, however, are severely limited, as I shall discuss in the next section, and in any case they are independent of the meaning of "coast line" in the Submerged Lands

Act. I conclude that the "open sea" argument adds no extra weight to Alaska's case.

E. The impermissible contraction theory

According to the analysis so far, Alaska's grant under the Submerged Lands Act is measured outward from its coastline; the coastline depends on the seaward limit of inland waters; and inland waters are to be defined according to the Convention.

Under the Convention, waters can qualify as inland waters in three ways: (1) they are landward of the normal baseline or of the closing line across a bay, river, or harbor; (2) the method of straight baselines is used, and they are landward of a straight baseline; or (3) they qualify as a historic bay.

The United States' position, as already described, calls for use of the first method. In general the normal baseline is the low-water line (Article 3), with special provisions for bays (Article 7), harbor works (Article 8), and rivers (Article 13), but not for fringing islands. *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 66-73 (1969).

Alaska argues for applying the Convention's second ground for inland waters, straight baselines, but not for the third ground, historic bays.¹³ Alaska also offers another the-

¹³ By Article 7(6) of the Convention, "so-called 'historic' bays" are exempted from the usual rules for bays (Art. 7(1)-7(5)). The Court has applied the doctrine of historic bays (or, more generally, of historic inland waters) to one fringing island situation, namely Mississippi Sound. *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93 (1985). The Court found there that "the United States has effectively exercised sovereignty over Mississippi Sound as inland waters from the time of the Louisiana Purchase in 1803 until 1971, and has done so without protest by foreign nations." 470 U.S. at 102.

The evidentiary requirements for historic inland waters are stringent, as the quotation just given indicates. Alaska does not claim to be able to

ory that is independent of the Convention, which may be called the "inland waters at statehood" argument. In this section I examine the legal bases of these arguments; in section F, I examine the underlying facts.

1. Article 4 straight baselines

Straight baselines under Article 4 of the Convention are the first of Alaska's proposed methods for determining the State's rights in submerged lands. See *supra* section B(1) and figures 3.3, 3.4, and 3.5.

The parties agree that the north coast of Alaska meets the geographical conditions for straight baselines, as described in Article 4(1), *supra* page 26. Alaska's witness, Dr. Prescott, drew such lines, and the United States agreed that, if Article 4 baselines were to be used at all, Dr. Prescott's lines were in general appropriate. See Tr. 2893-2920, 2921-24; Ak. Exs. 85-920A through 85-920T; AB 22-31.

The parties also agree, however, that the Convention makes the use of straight baselines permissive, not mandatory. Within the United States, the decision whether to use straight baselines is normally one for the Federal Government, not the states. *United States v. California*, 381 U.S. 139, 167-69 (1965); *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 72-73 (1969); *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 99 (1985); *United States v. Maine*, 475 U.S. 89, 94 n.9 (1986). The United States has chosen not to draw straight baselines under Article 4. Joint Statement 7. The

satisfy them for the lands along its north coast. Cf. *United States v. Alaska*, 422 U.S. 184 (1975) (holding evidence insufficient to show Cook Inlet a historic bay). Alaska does rely, however, on some of the same evidence as for Mississippi Sound about the general practice of the United States in claiming inland waters.

general rule would thus foreclose Alaska's claim to Article 4 baselines.

The cases have left room, however, for a possible exception to the general rule. In the 1965 *California* case, California argued that, if its inland waters were to be determined according to the Convention, they should be determined using Article 4. The Court, rejecting this argument, said that the State could not use Article 4 baselines to *extend* our international boundaries, beyond their traditional limits, against the expressed opposition of the United States:

We agree with the United States that the Convention recognizes the validity of straight base lines used by other countries, Norway for instance, and would *permit* the United States to use such base lines if it chose, but that California may not use such base lines to extend our international boundaries beyond their traditional international limits against the expressed opposition of the United States. . . . [A]n extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves. We conclude that the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States.

381 U.S. at 167-68. At the same time, the Court remarked that a *contraction* of a State's recognized territory by the United States in the name of foreign policy would be highly questionable:

The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over

which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable.

Id. at 168. To evaluate Alaska's argument, it thus becomes relevant to determine whether the use of straight baselines off Alaska's north coast would be an extension (or the failure to use them a contraction) compared to former practice.

In the *Louisiana Boundary Case*, 394 U.S. 11 (1969), Louisiana wanted to use Article 4 baselines connecting the mainland and fringes or chains of islands along the coast. *Id.* at 66-67. The Court held to its position in *California*. 394 U.S. at 72-73. It added that, if the United States refused to *extend* its coastline, it would not matter that the motivation was partially domestic:

While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, we adhere to the position that the selection of this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furthest extent consonant with international law.

Id. But, the Court said, if the United States had *contracted* its territory from a position that had been its "consistent official international stance . . . , it arguably could not abandon that stance solely to gain advantage" over Louisiana. *Id.* at 74 n.97. Louisiana was to be permitted to argue before the Special Master that the United States "had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4" in the past:

Louisiana further contends that the United States is estopped from denying the "inland water" status of such areas by its concession in earlier stages of this litigation that the areas between the mainland and all the offshore islands were inland waters. . . .

It might be argued that the United States' concession reflected its firm and continuing international policy to enclose inland waters within island fringes. It is not contended at this time, however, that the United States has taken that posture in its international relations to such an extent that it could be said to have, in effect, utilized the straight baseline approach sanctioned by Article 4 of the Convention. If that had been the consistent official international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana. Cf. *United States v. California*, 381 U.S. 139, 168: "[A] contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." We do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone.

Id. at 73 n.97 (1969).¹⁴

The parties have disputed exactly what showings would

¹⁴ In the *Louisiana Boundary Case*, the Master later found that the United States had not used straight baselines. *United States v. Louisiana (Louisiana Boundary Case)*, Report of Special Master Walter P. Armstrong, Jr. (1974) (U.S. Ex. 85-415), reprinted in Reed et al., *supra* note 8, at 181, and in 59 I.L.R. 249. The Court accepted the Master's report. 420 U.S. 529 (1975).

have to be made to bring Alaska within the dictum of the *Louisiana Boundary Case*. The most fundamental requirement, however, is clear: Alaska would be required to show that the United States' present position represents a contraction of territory, compared to its position at the relevant time or times in the past. Only if this first showing is made does it become necessary to decide what other requirements there may be.¹⁵

The next section, section F, will review the facts about whether Alaska's territory has been contracted.

2. *Inland waters at statehood*

The argument for using Article 4 straight baselines, introduced in the previous section, begins from the Court's statements in the 1965 *California* case and the *Louisiana Boundary Case*. Those statements, especially in *California*, emphasized the interests of the Federal Government and the states as sovereigns. Alaska also makes a separate argument which is independent of Article 4 and which rests on its rights of property. In the Joint Statement it formulated this second position as follows:

¹⁵ Other requirements that have been suggested or at least touched upon include the following:

1. That the United States must have followed "the principles and methods embodied in Article 4" quite literally, including even the publication of charts showing straight baselines in accordance with Article 4(6). USB 18, 42-44. *But see* Tr. 3558-59 (United States). For Alaska's views see AB 15, 107, 150-51; ARB 51-52 & app. A at 35-36; Tr. 3579-81.

2. That the United States must have contracted its territory "solely to gain advantage in a lawsuit to the detriment of" Alaska. USB 57-63. *But see* Tr. 3527 (Alaska), 3562 (United States) (agreeing for different reasons that motivation is irrelevant).

3. That all the criteria for a historic bay must be met. USB 55-56; Tr. 3557-60.

The *State of Alaska* contends that the submerged lands between the mainland and the barrier islands in the leased area underlie waters which Congress considered inland waters at the time Alaska was admitted to the Union. Accordingly, Alaska submits (1) that those lands vested in Alaska at the moment of statehood under the *Pollard* rule . . . and cannot be divested by any subsequent change of law; and (2) that the same result obtains under the Submerged Lands Act.

Joint Statement 9-10. See also Tr. 3528-29, 3585-86; ARB 39-45.

The argument has two strands, one based on the *Pollard* rule and the other on the Submerged Lands Act. In the second strand, the claim is that the Submerged Lands Act grant to Alaska took effect in January 1959 and so that Alaska's rights must be determined as of that date. This claim cannot be sustained. The same reasoning would lead one to say that, because the Submerged Lands Act took effect for the first forty-eight states in 1953, the rights of those states must be determined as of 1953. But the United States took that position in the 1965 *California* case, and the Court rejected it. 381 U.S. at 164-65. Nor did Congress impose a special reading on the Submerged Lands Act as applied to Alaska. On the contrary, the Congress that enacted the Alaska Statehood Act intended that Alaska be treated under the Submerged Lands Act like the other states. See *supra* section D(1).

The other part of Alaska's argument is based on the *Pollard* doctrine, which says that new states, upon admission to the Union, take title to the beds of inland navigable waters within their boundaries. Alaska says the disputed areas were considered inland waters at statehood by virtue of the ten-mile rule—the second of its proposed delimitation methods. Therefore, Alaska concludes, actions purporting to divest it of these areas would be an impermissible contraction of its

territory under the 1965 *California* and *Louisiana Boundary* cases.

The United States responds that the ten-mile rule was "not an unqualified principle and most likely would not serve to enclose the waters shoreward of the barrier islands off the North Slope of Alaska." USB 6. Further, it says that the rule was not its policy at Alaska's statehood in January 1959: "[T]he federal evidence indicates that the United States ceased following the so-called ten-mile rule for international purposes as soon as the Convention had been signed in 1958." USB 8-9. See also USB 18-42 (giving the United States' version of the policy over the years); USB 53-54 (on the qualifications to the rule); USRB 9 n.3, 13-14 (also on the qualifications). Finally, the United States argues that whatever the policy at statehood in 1959, the doctrine of *Pollard v. Hagan* does not freeze the definition of inland waters as of that date.

I turn to the evaluation of these arguments in section F.

3. General remarks

Alaska points out that it is not attempting to show that the waters inside barrier islands qualify as historic bays under Article 7(6) of the Convention. Rather, it seeks to show that these waters were inland by virtue of a general delimitation system that the United States employed at the times significant to the development of Alaska's rights. AB 124-25; Tr. 3531-32. Either because the system amounted to a long-standing use of straight baselines, or because the system made the waters inland at the moment of statehood, a later move to the normal baseline provisions of the Convention creates, in Alaska's view, an impermissible contraction of its territory.

If this were a historic bay case, the burden would be on Alaska to show, *inter alia*, a long-continued exercise of governmental authority over the disputed areas as inland waters.

See *United States v. California*, 381 U.S. 139, 172-75 (1965); *Louisiana Boundary Case*, 394 U.S. 11, 74-78 (1969); *United States v. Alaska*, 422 U.S. 184 (1975); *Alabama and Mississippi Boundary Case*, 470 U.S. 93 (1985). I assume *arguendo* that something less than the disclaimer of a historic bay might amount to an impermissible contraction of a state's territory.¹⁶ To relax the requirements, however, is not to shift the burden of proof. Alaska must at least show that the disputed areas were once part of its territory. Where no particularized claim to these areas has been made, it would require a rather well-established and well-defined rule for inland water delimitation to imply such a claim. For such a rule, Alaska relies on the *Alabama and Mississippi Boundary Case*.

F. Past delimitation practice of the United States

The past practice of the United States in delimiting its inland waters and territorial sea bears on two related but distinguishable questions, raised in sections E(1) and E(2):

1. Has there been a contraction of Alaska's recognized territory within the meaning of the *California* and *Louisiana Boundary* cases?
2. Were the disputed areas considered inland waters at Alaska's statehood?

In addition, a review of the practice will lead to a conclusion about Alaska's final theory, which is based on the assimilation of certain waters to the territorial sea.

1. *The Alabama and Mississippi Boundary Case*

As noted in section B(2), the Court has already made a finding as to the delimitation practice of the United States in 1959. The context of that finding was a controversy over the status of Mississippi Sound. The Court said:

¹⁶ The United States suggests the contrary. See *supra* note 15.

Prior to its ratification of the Convention on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles. This 10-mile rule represented the publicly stated policy of the United States at least since the time of the *Alaska Boundary Arbitration* in 1903. There is no doubt that foreign nations were aware that the United States had adopted this policy. Indeed, the United States' policy was cited and discussed at length by both the United Kingdom and Norway in the celebrated *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116. Nor is there any doubt, under the stipulations of the parties in this case, that Mississippi Sound constitutes inland waters under that view.

United States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93, 106-07 (1985) (footnotes omitted). In a footnote the Court added:

The United States confirmed this policy in a number of official communications during the period from 1951 to 1961. See Report of Special Master 48-54. Also, the United States followed this policy in drawing the Chapman line along the Louisiana coast following the decision in *United States v. Louisiana*, 339 U.S. 699 (1950). See Shalowitz, at 161. In a letter to Governor Wright of Mississippi, written on October 17, 1951, Oscar L. Chapman, then Secretary of the Interior, indicated that if the Chapman line were extended eastward beyond the Louisiana border, it would enclose Mississippi Sound as inland waters.

470 U.S. at 106 n.9.

The parties agree that the Court's finding in the *Alabama and Mississippi Boundary Case* was one of fact, and Alaska does not seek to invoke collateral estoppel against the United

States. Rather, Alaska has introduced evidence aimed at proving the ten-mile rule independently—including, among many other documents, those referred to in the Court's footnote and in the Master's report there cited. The United States contests Alaska's interpretation of the evidence. It says that the Court's statement of the ten-mile rule was overly broad and was not necessary to the decision.

I agree with the United States that the ten-mile rule was not strictly necessary to the decision. It was one element among others contributing to a finding that Mississippi Sound was a historic bay. See *supra* page 44 n.13.

As to the scope of the rule, the United States explains that the matter was not fully briefed. Tr. 3567. The explanation seems correct. In his report (*supra* page 30), Special Master Armstrong quoted numerous statements of the pre-Convention policy for delimiting inland waters, *id.* at 39–42, 48–53, and he concluded:

On March 24, 1961 the United States ratified the Geneva Convention, which, as noted in *United States v. California*, *supra*, represented a departure from its previously held position; therefore the material quoted above represents the publicly stated position of the United States from 1903 (*Alaskan Boundary Arbitration*) to that date. Under that position, there is no doubt that Mississippi Sound constituted inland waters, as none of its mouths exceeds ten miles in width.

Id. at 53–54. There is considerable variation among the statements the Master quoted in support of this conclusion, but as I read the report, he did not select any particular statement of policy as being more accurate or more authoritative than the others. Rather, the selection was ascribed to him by Mississippi in its reply brief to the Court:

Neither does the United States take issue with the Master's finding that the United States prior to the effective

date (September 10, 1964) of the Convention on the Territorial Sea had adopted a policy of enclosing as internal waters those areas between the mainland and offlying islands which were so closely grouped that no entrance exceeded ten (10) nautical miles in width. (Report, pp. 41–44 and 48–54).

Reply Brief for the State of Mississippi at 26–27, *Alabama and Mississippi Boundary Case*, 470 U.S. 93 (1985) (footnote omitted). At oral argument, counsel for Alabama described the policy somewhat differently:

[T]he ten-mile rule . . . is basically a rule that inland waters of the United States which are straits or sound[s] which lead to other bodies of inland water, which are no more than ten miles wide, should be dealt with and enclosed as inland water.

Transcript of oral argument, *Alabama and Mississippi Boundary Case* (Ak. Ex. 85-231a), at 37. The Court's opinion then stated the rule in the language Mississippi had used, with a correction in the duration to accord with the Master's finding. 470 U.S. at 106–07.

Given this history, I do not believe that the Court in the *Alabama and Mississippi Boundary Case* intended to pass upon what statement of the rule most accurately reflected United States policy regarding near-shore islands. For Mississippi Sound, the differences among statements apparently made no difference in result. For the northern coast of Alaska, that may not be the case. Moreover, as the differing descriptions just referred to suggest, the exact nature of the United States' historic practice is a matter of some intricacy. Because of the Court's statement in the *Alabama and Mississippi Boundary Case*, I have included in this report a more detailed examination of the practice than might otherwise have seemed necessary.

2. *United States policy to 1929*

In the 1947 *California* case the Court found that, shortly after we became a nation, our statesmen took actions that led to acquisition by the Federal Government of a three-mile belt of marginal sea:

From all the wealth of material supplied, . . . we cannot say that the thirteen original colonies separately acquired ownership to the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it.

At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders. . . .

It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. . . .

Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty.

United States v. California, 332 U.S. 19, 31-34 (1947) (citations and footnotes omitted).

The parties have traced the development of this claim to a marginal belt and, with it, the development of the doctrine of inland waters, from whose seaward limit the marginal belt begins. Rather little of the early material deals specifically

with waters behind islands. The authorities that do exist, however, provide background useful for understanding later efforts at codification.

a. *Delaware Bay*

The first relevant precedent was an opinion submitted in 1793 by Attorney General Edmund Randolph to Secretary of State Thomas Jefferson. *Seizure in Neutral Waters*, 1 Op. Att'y Gen. 32. Although the facts involved a bay rather than islands,¹⁷ the opinion quoted one passage relevant to both. The following comes from the seventeenth-century Dutch writer Hugo Grotius:

[I]t seems to appear that the property and dominion of the sea might belong to him who is in possession of the lands on both sides, though it be open above as a gulf, *or above and below as a strait*; provided it is not so great a part of the sea, that, when compared with the land on both sides, it cannot be supposed to be some part of them.

1 Op. Att'y Gen. at 36 (quoting Grotius, *Of War and Peace*, book 2, ch. 3, sec. 7) (emphasis added). The significance of this passage has recently been noted in connection with another dispute involving islands less than ten miles apart. *United States v. Maine (Massachusetts Boundary Case)*, Report of Special Master Walter E. Hoffman, at 34-36, 38,

¹⁷ Randolph held that Delaware Bay was within the territory of the United States and that the ship *Grange* had therefore been illegally seized in neutral waters.

On the basis of Attorney General Randolph's opinion, Delaware Bay has been claimed as historic inland waters of the United States and then, under the 1958 Convention, as a juridical bay less than 24 miles wide. Ak. Ex. 85-208, at 7 (attachment to letter from Edmund B. Clark, Department of Justice, to Leonard C. Meeker, Legal Adviser, Department of State (Sept. 23, 1968)); Ak. Ex. 85-215 (letter from Leonard C. Meeker to Solicitor General Erwin N. Griswold (Apr. 8, 1969)).

62-63 (Oct. Term, 1984) (U.S. Ex. 85-903), *reprinted in* Reed et al., *supra* note 8, at 703, *exception overruled*, 475 U.S. 89 (1986).¹⁸

b. Long Island Sound

Another early case, this one concerning Long Island Sound, was decided by the New York Court of Appeals in 1866. *Mahler v. Norwich & New York Transportation Co.*, 35 N.Y. 352. A fatal boating accident took place on the sound, and the plaintiff charged the transportation company with negligence. The trial court dismissed the complaint on the ground that the collision occurred outside the jurisdiction of the State of New York. The Court of Appeals, reversing, found that the place of the accident was within the state boundary. To construe the boundary statute as excluding the waters of the sound, the Court said,

would be an abandonment, by a maritime power, of jurisdiction over an inland body of water, inclosed within the

¹⁸ In the dispute before Special Master Hoffman, Massachusetts claimed Vineyard Sound and Nantucket Sound as historic inland waters under Article 7(6) of the 1958 Convention. Report at 9, 10. The Master found that both sounds were "the kinds of bodies of water which both English and American practice [during the colonial and early national periods] would have considered suitable for treatment as inland, county waters" or "waters *inter fauces terrae*." *Id.* at 37-38.

Ultimately Special Master Hoffman concluded that Massachusetts had established historic title to Vineyard Sound, Report at 61, but not to Nantucket Sound because there had been no timely actual assertion of jurisdiction, *id.* at 64-66. Regarding the effect of the ten-mile rule as found by the Court in the *Alabama and Mississippi Boundary Case*, the Master repeated that "while either the United States or Massachusetts *could* have treated Nantucket Sound as internal waters, their actions and fishing statutes, standing alone, could only serve as an exercise of jurisdiction, but fell short to show any actual intent to establish jurisdiction over Nantucket Sound." Report at 69.3 n.1.

State at each of its termini, and with no outlet to the ocean except under the command of our cannon from either shore.

....
That Long Island Sound was included within the territorial dominions of the British Empire, at the date of the charter from Charles the Second to the Duke of York, is a proposition too plain for argument. It was an inland arm of the sea, washing no shores but those of the provinces, and with no opening to the ocean, except by passing between British headlands less than five miles apart. . . . The rule is one of universal recognition, that a bay, strait, sound or arm of the sea, lying wholly within the domain of a sovereign, and admitting no ingress from the ocean, except by a channel between contiguous headlands which he can command with his cannon on either side, is the subject of territorial dominion. . . . Within this rule, the islands at the eastern extremity of Long Island Sound are the *fauces terrae*, which define the limits of territorial authority, and mark the line of separation between the open ocean and the inland sea.

Id. at 354-56 (citations omitted). Either by the charter to the Duke of York or by the revolution, the states had succeeded to the rights of the king, *id.* at 356, and New York had not relinquished these rights (so far as pertinent here) to the Federal Government, *id.* at 357. Furthermore, New York's jurisdiction over Long Island Sound was supported by long usage and had never been disputed. *Id.* at 360.

Although the *Mahler* case does not state a ten-mile rule,¹⁹ it has been cited as a principal authority for treating islands

¹⁹ The range of cannon, mentioned in the opinion, was conventionally taken to be three miles. See 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* 24-26 (U.S. Dep't of Commerce Pub. 10-1, 1962).

less than ten miles apart as enclosing inland waters. 1 Shalowitz, *supra* note 19, at 108 n.7. See also *id.* at 141 n.73.²⁰

c. Cuba and the Florida keys

Another early occasion for considering the effect of islands was a dispute between the United States and Spain over the breadth and delimitation of the territorial sea off the coast of Cuba. On August 10, 1863, Secretary of State Seward wrote to Mr. Tassara, the Spanish Minister, protesting Spain's claim to a six-mile breadth but acknowledging that, along some parts of the coast, the baseline would be a line of offshore keys:

The undersigned has further ascertained, as he thinks, that the line of keys which confront other portions of the Cuban coast resemble, in dimensions, constitution and vicinity to the mainland, the keys which lie off the Southern Florida coast of the United States. The undersigned assumes that this line of keys is properly to be regarded as the exterior coast-line, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys.

Ak. Ex. 85-29. As I shall describe shortly, the United States

²⁰ Long Island Sound itself is now treated (together with part of Block Island Sound) as a juridical bay under Article 7 of the Convention. *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504 (1985). Under the Court's interpretation of the Convention, that result was made possible only by a finding that Long Island could be treated as part of the mainland. *Id.* at 514-20. Previously, Long Island Sound (but not Block Island Sound) was claimed as historic internal waters. *Id.* at 509.

Alaska has not argued that the islands off its Arctic coast could be treated as part of the mainland.

later quoted this letter as representative of its own position regarding the baseline and the treatment of islands.²¹

d. The Alaska boundary arbitration

Although the preceding materials provide some authority for treating waters inside islands as inland waters, Alaska dates the "full formulation" of a ten-mile rule for islands to the Alaska boundary arbitration of 1903. AB 48. This arbitration, conducted pursuant to treaty between the United States and Great Britain, is reported in *Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Cong., 2d Sess. (1903-04) (hereafter *Proceedings*).

The general area of concern in the arbitration was the Alaska panhandle, that is, the southeastern part of Alaska and not the Arctic coast. The issue was the boundary line between the United States and Canada. This line, inland from the Alexander Archipelago, was first described in a treaty between Russia and Great Britain in 1825. Decision of the Alaskan Boundary Tribunal, 1 *Proceedings*, pt. 1 at 30-31. The same boundary description had been used in the 1867 treaty by which Russia ceded Alaska to the United States. See Argument of the United States, 5 *Proceedings*, pt. 1 at 4.

The boundary was defined in terms of the ocean and the coast. In part, it was to follow "the summit of the mountains situated parallel to the coast," provided, however, that whenever the summit was "more than 10 marine leagues from the ocean," the boundary would be "a line parallel to the windings of the coast, and which shall never exceed the distance

²¹ The letter does not describe the United States' present position. It is now established that the Florida keys do not enclose inland waters. *United States v. Florida*, 425 U.S. 791, 793 (1976); *id.*, Supplemental Report of Special Master Albert B. Maris (1975) (U.S. Ex. 85-507), reprinted in Reed et al., *supra* note 8, at 575.

of 10 marine leagues therefrom.”²² Thus, Alaska was to include a strip, or *lisière*, whose inland boundary was at most ten leagues from the coast and, if the mountains referred to were nearer, at their summit.

²² The 1825 treaty, as translated from the French in the opinion of the United States members of the tribunal, read as follows:

III. The line of demarcation between the possessions of the High Contracting Parties, upon the coast of the continent, and the islands of America to the northwest, shall be drawn in the manner following:—

Commencing from the southernmost point of the island called Prince of Wales’ Island, which point lies in the parallel of 54° 40’ north latitude, and between the 131st and the 133rd degrees of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains (‘la crête des montagnes’) situated parallel to the coast, as far as the point of intersection of the 141st degree of west longitude (of the same meridian); and, finally, from the said point of intersection, the said meridian line of the 141st degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British possessions on the continent of America to the north-west.

IV. With reference to the line of demarcation laid down in the preceding Article, it is understood:

First. That the island called Prince of Wales’ Island shall belong wholly to Russia.

Second. That whether the summit of the mountains (‘la crête des montagnes’) which extend in a direction parallel to the coast, from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude, shall prove to be at the distance of more than 10 marine leagues from the ocean, the limit between the British possessions and the line of coast which is to belong to Russia, as above mentioned, shall be formed by a line parallel to the windings of the coast, and which shall never exceed the distance of 10 marine leagues therefrom.

1 *Proceedings*, pt. 1 at 47.

Both sides agreed that the maximum width of the *lisière* was to be measured from the mainland. Great Britain, however, drew the line from which to measure as crossing certain deep inlets into the mainland at their mouths, not as following all the sinuosities of the mainland shore. Case of Great Britain, 3 *Proceedings*, pt. 1 at 79–80. For Lynn Canal, a mainland indentation more than ten miles wide, it proposed a crossing where the canal first narrowed to ten miles or, with a stricter rule, to six miles. *Id.*²³

The United States argued that this procedure confused the physical coastline with the political coastline. In the United States’ view, the treaty used “coast” to mean the physical shoreline of the mainland, including all its sinuosities. Thus the *lisière* ran inland from (for example) the head of Lynn

²³ In support of a ten-mile line, Great Britain quoted the bay-closing rule from a convention on North Sea fisheries: “As regards bays, the distance of three miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles.” Case of Great Britain, 3 *Proceedings*, pt. 1 at 79. The British Counter-Case discussed additional authorities, 4 *Proceedings*, pt. 3 at 26–32, and concluded:

It is submitted that the result of the authorities is as follows:—

1. The precise limits within which international law regards bays as territorial waters have never been determined.
2. There is much authority for the opinion that a bay is not necessarily part of the high seas because its opening is wider than twice the breadth of the ordinary belt of territorial water, and that the territorial dominion over the larger gulfs must be settled by a consideration of each individual case. The possession of islands blocking or guarding the inlet, the prominence of the headlands, and the actual exercise of national authority over the waters claimed, are evidence going to justify the claim.
3. If the size and configuration of an opening is such that the line may rightly be drawn from headland to headland, the belt of territorial water is to be measured from the line *outwards*.

Id. at 32.

Canal and not from some more seaward line. In contrast, the United States said that the political coastline ran outside the islands of the Alexander Archipelago. Counter Case of the United States, 4 *Proceedings*, pt. 1 at 31-32; Argument of the United States, 5 *Proceedings*, pt. 1 at 14-18 (Ak. Ex. 85-41).²⁴ Spelling out this position at oral argument, counsel for the United States said:

²⁴ The United States said in its Counter Case:

The political coast line (since all arms of the sea not exceeding six miles, and in some cases more, in width, and all islands are practically treated as portions of the mainland) extends outside the islands and waters between them. In the present instance the political or legal coast line drawn southward from Cape Spencer would cross to the northwestern shore of Chichagof Island and follow down the western side of that island and of Baranof Island to Cape Ommaney; at this point it would turn northward for a short distance and then cross Chatham Strait to the western shore of Kuiu Island; thence again turning southward along that shore and along the outlying islets west of Prince of Wales Island, the line would round Cape Muzon and proceed eastward to Cape Chacon; thence following northward along the eastern shore of Prince of Wales Island to Clarence Strait it would cross the latter at its entrance and proceed southeastward to the parallel of 54°40' at the point where it enters Portland Canal. Thus the political coast line of Southeastern Alaska does not touch the mainland between Cape Spencer and 55° of north latitude.

Counter Case of the United States, 4 *Proceedings*, pt. 1 at 31-32. To similar effect was the printed argument of the United States:

The boundary of Alaska,—that is, the exterior boundary from which the marine league is measured,—runs along the outer edge of the Alaskan or Alexander Archipelago, embracing a group composed of hundreds of islands. When "measured in a straight line from headland to headland" at their entrances, Chatham Strait, Cross Sound, Sumner Strait and Clarence Strait, by which this exterior coast line is pierced, measure less than ten miles. That fact, according to the authorities quoted in the British Counter-Case, pp. 24-28, places them within the category of territorial waters. All of the interior waters touching upon the *lisière*, such as Behm Canal, Taku Inlet and Lynn Canal are, in the

[The political coast line] is an imaginary line which the law superimposes upon the physical coast line as a basis. But for the purposes of international law, instead of following all the convolutions and sinuosities of the coast, it is permitted to go across the heads of bays and inlets, and it is in that particular that the rule of international law comes in as to the width of bays and inlets, either 6 or 10 miles. We are not encumbered with that question, because the British Case contends that they must be 10 miles, and we do not dispute it, and these outside inlets are 10 miles. . . . The minute you establish it, the minute you fix it, all waters back of it, whether they are waters in the Archipelago there of Alexander or the Archipiélago de Los Canarios, of Cuba, they all became, as Hall says, salt-water lakes: they are just as much interior waters as the interior waters of Loch Lomond

Argument of Hannis Taylor, 7 *Proceedings* 611 (in Ak. Ex. 85-18).²⁵ It is this statement of position on behalf of the United States that is said to constitute the "full formulation" of a ten-mile rule for islands. See AB 48-49, 152-54.

The tribunal decided the issue before it in favor of the United States.²⁶ The opinions did not address the location of the political coastline.

language of Hall, "lakes enclosed within the territory", and as such are territorial waters, regardless of their width at their entrances when measured from headland to headland.

Argument of the United States, 5 *Proceedings*, pt. 1 at 15-16. For a depiction of the boundary described, see Ak. Ex. 85-901A. Related testimony appears at Tr. 2632-40, 2716-20, 2745-47. See also Ak. Ex. 85-99, U.S. Ex. 85-328 (containing a 1952 Justice Department memorandum, "Alaskan Boundary Controversy").

²⁵ Taylor's reference in the last sentence is to William E. Hall, *International Law* 129-30 (4th ed. 1895) (Ak. Ex. 85-32).

²⁶ Altogether seven questions were submitted to the tribunal. Referred to here is question 5, which the tribunal answered "yes":

e. Mississippi Sound

One more early case involving offshore islands is *Louisiana v. Mississippi*, 202 U.S. 1 (1906). The issue there was the water boundary between the two states. The Court found that the boundary followed the deep water channel, or *thalweg*, from the Pearl River into Lake Borgne and thence through Mississippi Sound to the Gulf of Mexico.

In so concluding, the Court held that Mississippi Sound was inland waters. It described the sound as follows:

Mississippi's mainland borders on Mississippi Sound. This is an inclosed arm of the sea, wholly within the United States, and formed by a chain of large islands, extending westward from Mobile, Alabama, to Cat Island. The openings from this body of water into the Gulf are neither of them six miles wide. Such openings occur between Cat Island and Isle à Pitre; between Cat and Ship Islands; between Ship and Horn Islands; between Horn and Petit Bois Islands; between Petit Bois and Dauphin Islands; and between Dauphin Island and the mainland on the west coast of Mobile Bay.

202 U.S. at 48. In considering the status of these waters, the Court quoted from *Manchester v. Massachusetts*, 139 U.S. 240, 258 (1891) (concerning Buzzards Bay, Massachusetts):

5. . . . was it the intention and meaning of the said Convention of 1825 that there should remain in the exclusive possession of Russia a continuous fringe, or strip, of coast on the mainland, not exceeding 10 marine leagues in width, separating the British possessions from the bays, ports, inlets, havens, and waters of the ocean, and extending from the said point on the 56th degree of latitude north to a point where such line of demarcation should intersect the 141st degree of longitude west of the meridian of Greenwich?

The tribunal therefore found it unnecessary to answer question 6, which asked from where the width of the *lisière* was to be measured in the event that question 5 was answered "no." 1 *Proceedings*, pt. 1 at 30-32.

We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit

202 U.S. at 52. The Court also quoted from Hall's *International Law*, *supra* note 25, concerning the coast of Cuba. 202 U.S. at 53.

Apparently the Buzzards Bay case was the controlling precedent. The Court recently said of its 1906 decision on Mississippi Sound:

The Court clearly treated Mississippi Sound as inland waters, under the category of "bays wholly within [the Nation's] territory not exceeding two marine leagues in width at the mouth."

Alabama and Mississippi Boundary Case, 470 U.S. 93, 108 (1985).²⁷

f. General statements

The precedents reviewed above all deal with particular bodies of water. In 1929, the United States had two occasions to state its policies more generally.

The first of these is unilluminating. The Norwegian government had asked the State Department for "copies of any regulations which might exist regarding the delineation of the political coastline or the drawing up of the limit between internal and territorial waters." 1 Green H. Hackworth, *Digest of International Law* 644 (1940) (Ak. Ex. 85-52). By a letter of July 13, 1929, the Department replied that the

²⁷ At present, of course, Mississippi Sound is treated as inland waters on the ground that it is a historic bay. *Alabama and Mississippi Boundary Case*, 470 U.S. 93 (1985).

"geographic points for drawing up the basic lines" had not been determined except for "certain limited areas covered by special treaty or agreement." Federal agencies had made their own determinations for administrative purposes, but no final determination had been made that would be binding on all agencies. *Id.* at 644-45.²⁸

The other occasion was a questionnaire circulated under auspices of the League of Nations. A first conference on the progressive codification of international law was in the planning stages, and territorial waters was to be one of the conference topics.²⁹ The preparatory committee asked governments to supply information on a Schedule of Points that included the following:

²⁸ I cannot agree with the United States in reading this letter as saying, USB 23, "that we had adopted *no* inland water delimitation principles." Rather it says only, as Alaska points out, that the precise lines had not been established.

Alaska observes that the State Department, with its reply, enclosed copies of pilot rules describing certain lines of inland waters. The Department noted, however, that these lines were for navigational purposes and did not represent territorial boundaries. 1 Hackworth *Digest* 645. The Court has already found that the stated limitation to navigational purposes meant what it said. *Louisiana Boundary Case*, 394 U.S. 11, 31-32 (1969).

²⁹ For details on the background of the conference, see 1 *League of Nations Conference for the Codification of International Law* [1930] (ed. Shabtai Rosenne 1975) ix-xviii. The conference documents that will be referred to below are as follows:

Conference for the Codification of International Law, 2 Bases of Discussion: Territorial Waters, League of Nations Doc. C.74.M.39. 1929.V (1929), reprinted in 2 Rosenne, *supra*, and excerpted in Ak. Ex. 85-4 (hereafter *Bases of Discussion*).

3 *Acts of the Conference for the Codification of International Law, Minutes of the Second Committee: Territorial Waters*, League of Nations Doc. C.351(b).M.145(b).1930.V (1930), reprinted in 4 Rosenne, *supra*, and excerpted in Ak. Ex. 85-1 (hereafter *Acts of Conference*).

IV. *Determination of the base line for calculation of the breadth of territorial waters.*

(a) Along the coasts. Is the line that of low tide following the sinuosities of the coast; or a line drawn between the outermost points of the coast, islands, islets or rocks; or some other line? Is the distance between islands and the coast to be taken into account in this connection?

(b) In front of bays. Breadth of the bay to be taken into account. Historic bays. Bays whose coasts belong to two or more States.

V. *Territorial waters around islands.*

An island near the mainland. An island at a distance from the mainland. A group of islands; how near must islands be to one another to cause the whole group to possess a single belt of territorial waters?

VII. *Straits.*

Conditions determining what are territorial waters within a strait connecting two areas of open sea or the open sea and an inland sea: (a) when the coasts belong to a single State; (b) when they belong to two or more States.

Bases of Discussion, *supra* note 29, at 104-05.

The United States' reply to the points was by letter of March 16, 1929. *Id.* at 128-54. The reply consisted largely of quotations from diplomatic correspondence, judicial decisions, and other primary source material.

For islands (points IV(a) and V), the material quoted included the correspondence with Cuba, *supra* page 60, and other materials that are less clear or less relevant here. *Bases of Discussion*, *supra* note 29, at 143-44, 145. The reply does not mention the Alaska boundary arbitration or any other source that might be thought to state a definite rule for

when waters landward of islands would be considered inland waters. Various distances are stated even in the authorities mentioned for bays (point IV(b)). *Id.* at 144, 131.

In addition, a rule based only on the distance of islands from the mainland or from each other would have been inconsistent with the United States' reply on straits where both coasts belonged to the same country (point VII(a)). That part of the reply cited, for example, a letter stating:

The Government of the United States will not tolerate exclusive claims by any nation whatsoever to the Straits of Magellan, and will hold responsible any Government that undertakes, no matter on what pretext, to lay any impost or check on United States commerce through those Straits.

Bases of Discussion, *supra* note 29, at 145, 133, quoting an instruction dated January 18, 1879, from Secretary of State Evarts to the American Legation at Santiago, Chile (as reported in 1 John B. Moore, *Digest of International Law* 664 (1906)). Surely this position did not depend on an assumption that the Strait of Magellan, formed by islands off the southern tip of Chile, was more than ten miles wide.³⁰

I am therefore left in some doubt as to whether a ten-mile rule for islands, as of 1929, was quite so well established as Alaska argues and as the Court's finding in the *Alabama and Mississippi Boundary Case* would suggest.

³⁰ In fact the Strait of Magellan contains considerable stretches less than ten miles wide and one section as narrow as two miles. The strait is about 310 miles long. See R.H. Kennedy, *A Brief Geographical and Hydrographical Study of Straits Which Constitute Routes for International Traffic*, U.N. Doc. A/CONF.13/6 & Add. 1, in U.N. Conference on the Law of the Sea, 1 Official Records 114, 120-22, 150-51, U.N. Doc. A/CONF.13/37 (1958).

3. United States policy from 1930 to 1949

a. Proposals at the Hague conference of 1930

The parties agree that the League of Nations conference in 1930 marked the beginning of a new approach in the United States' treatment of offshore islands. See AB 52-53; USB 26-29. Before the conference, as the last section described, the United States had answered a questionnaire about its policy on territorial waters by producing a long compendium of precedents. By the time the conference convened, the preparatory committee had received replies to its questionnaire from numerous governments and had drawn up a set of bases of discussion. *Bases of Discussion*, *supra* note 29, at 10-102; *Acts of Conference*, *supra* note 29, at 179-81.

United States officials responded to the bases of discussion with proposed amendments and additions. *Acts of Conference*, *supra* note 29, at 195-201. See also S. Whittemore Boggs, *Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law*, 24 Am. J. Int'l L. 541 (1930) (Ak. Ex. 85-61, U.S. Ex. 85-223). These proposals require careful examination, for they were later cited as the best evidence of the United States' official position.

The United States' proposals at the 1930 Hague conference included a general principle and provisions for special types of formations such as bays, islands, and straits. The general principle—now a familiar one—called for a three-mile belt of territorial sea, to be measured from the shore or the seaward limit of inland waters, by the method of arcs of circles.³¹ The provision for islands simply gave each island

³¹ The principle stated:

Except as otherwise provided in this Convention, the seaward limit of the territorial waters is the envelope of all arcs of circles hav-

its own three-mile belt of territorial sea.³² It was recognized that this treatment of islands might create small enclaves or cul-de-sacs of high seas, such as those shown earlier in figure 3.6. The United States proposed that such areas might be assimilated to the territorial sea:

G. Simplification and Assimilation.

New Basis of Discussion.

1. Where the delimitation of territorial waters would result in leaving a small area of high sea totally surrounded by territorial waters of one or more States, the area is assimilated to the territorial waters of such State or States.

2. Where the delimitation of territorial waters, as prescribed in the foregoing articles, results in a pronounced concavity such that a single straight line, not more than four nautical miles in length, . . . entirely closes an indentation, the coastal State may regard the body of water enclosed . . . as an extension of its territorial waters if the area exceeds the area of a semi-circle whose diameter is equal to the length of the straight line; if the coastal State chooses to assimilate these waters it shall notify the nations which may be interested therein.

Acts of Conference, supra note 29, at 201. Mr. S. Whittemore Boggs, the Geographer of the State Department, explained the proposal as follows in his paper published just after the 1930 conference:

ing a radius of three nautical miles drawn from all points on the coast (at whatever line of sea level is adopted in the charts of the coastal State), or from the seaward limit of those interior waters which are contiguous with the territorial waters

Acts of Conference, supra note 29, at 197.

³² The provision stated in part: "Each island . . . is enveloped by its own belt of territorial waters, measured three nautical miles outward from the coast thereof in the manner prescribed in Article" *Acts of Conference, supra* note 29, at 200.

[I]t will be found that when the arcs of circles of three-mile radius have been drawn from all points on the coastline of both mainland and islands, and when it has been determined what indentations of the coast have the configuration of closed bays whose waters are interior or national waters, there will remain small pockets of the high sea deeply indenting territorial waters. These pockets appear only where there are islands. They may be occasioned by the presence of one or more islands near the mainland, or of any number of islands at any distance from the mainland. Because the coast-line, and the groupings of islands, are of infinite variety, there is no conceivable general rule for delimiting territorial waters which will not result in these anomalies on the chart when the three-mile limit is drawn.

It was rather generally admitted, however, that these anomalous pockets of high sea should be eliminated in some simple fashion. From the viewpoints of both the navigator and the fisherman simplification is desirable.

The reasons for assimilating pockets are similar to the reasons for enclosing deep bays and other indentations in the mainland, namely, that they constitute no useful portion of the high sea from the viewpoint of navigation, and that they do not provide sufficient space in which the nationals of a foreign State may fish without encroaching upon territorial waters. The American proposal is to permit the assimilation of these pockets to the status of territorial waters (not interior waters) when a single straight line not to exceed four miles in length would enclose a pocket larger in area than a certain minimum

Boggs, *supra* page 71, at 552.

The United States' proposals on islands in 1930 were on their face inconsistent with a simple ten-mile rule for making waters behind islands inland waters. The inconsistency was not in the possible distance between islands, since a line of

up to four miles could be used to join two three-mile belts. But the 1930 proposals said that waters landward of coastal islands could be assimilated to the territorial sea; it did not convert them to inland waters. The baseline or coastline was to run around each island, and it did not include any straight lines joining islands together.

There was one possible exception to this treatment of islands. Islands might form a strait, and the United States' proposals in 1930 included one provision (paragraph 3 below) under which the waters of a strait could be inland waters:

The delimitation of territorial waters in straits shall be made in the following manner:

1. In the absence of agreement to the contrary, when both coasts of a strait which connect two seas having the character of high seas belong to a single State, and both entrances do not exceed six nautical miles in width, all of the waters of the strait are territorial waters of the coastal State; if both entrances or either one exceeds six nautical miles in width the breadth of the territorial waters is three nautical miles measured from each coast at low tide.

....

3. In the absence of agreement to the contrary, where a strait is merely a channel of communication with an inland sea, the rules regarding bays apply to such strait.

Acts of Conference, supra note 29, at 200-01.

This last paragraph, however, was apparently not meant to state an independent ground for finding inland waters. Read literally, it says that a strait cannot be treated as inland waters unless it qualifies as a bay.³³ Further, Mr. Boggs

³³ The "rules regarding bays," as proposed by the United States, were relatively elaborate. A bay was referred to as a "pronounced indentation or concavity" and was to be treated as inland waters if it met two requirements: the closing line across the bay could not exceed ten miles, and the

barely mentioned the provisions on straits in his 1930 paper, although he purported there to describe the American proposal as a whole. Boggs, *supra* page 71, at 553-54.

b. Authority of the 1930 proposals

The international conference at The Hague failed to adopt a convention, and the treatment of waters behind islands was considered only in subcommittee.³⁴ The United States, how-

area behind the closing line must be large enough to satisfy a geometrical formula based on the area of a semicircle. *Acts of Conference, supra* note 29, at 197-99. See also section IV(C)(2)(a), *infra*.

³⁴ The subcommittee proposed several draft articles, accompanied by observations. The article on the baseline stated: "Subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the line of low-water mark along the entire coast." *Acts of Conference, supra* note 29, at 217. The article on islands said: "Every island has its own territorial sea." *Id.* at 219. On the topic of groups of islands, the subcommittee did not propose an article but wrote the following observations:

With regard to a group of islands (archipelago) and islands situated along the coast, the majority of the Sub-Committee was of opinion that a distance of ten miles should be adopted as a basis for measuring the territorial sea outward in the direction of the high sea. Owing to the lack of technical details, however, the idea of drafting a definite text on this subject had to be abandoned. The Sub-Committee did not express any opinion with regard to the nature of the waters included within the group.

Id. For straits "which form a passage between two parts of the high sea," the subcommittee proposed that the waters would be either territorial waters or high sea. *Id.* at 220. In commentary, it added:

The application of the article is limited to straits which serve as a passage between two parts of the high sea. It does not touch the regulation of straits which give access to inland waters only. As regards such straits, the rules concerning bays, and, where necessary, islands, will continue to be applicable.

Id. The comment indicates that a strait leading to inland waters was not automatically to become inland waters itself. Rather, the strait would

ever, gave continuing significance to its own proposals. Alaska suggests that, in later submerged lands litigation, the United States has taken varying positions about whether the assimilation method was a "mere proposal" or an official position. AB 53. Alaska itself suggests that assimilation was the rule from 1930 to 1949. AB 54. The United States now takes the view that the 1930 assimilation proposal "clearly became the United States' position," USB 27, and remained so until 1950, Tr. 3567, 3571.

The most important evidence supporting this view dates from 1949. There are two documents. The first, dated August 12, 1949, was a memorandum filed by the United States with the Special Master in *United States v. California*.³⁵ Memorandum of the United States in Response to

have to qualify independently under whatever rules were provided for bays and islands. For bays, the subcommittee recommended ten miles as the maximum closing line. *Id.* at 217. It observed that most delegations agreed to this width "provided a system were simultaneously adopted under which slight indentations would not be treated as bays." *Id.* at 218. As possibilities for such a system the subcommittee attached both the United States' proposal on bays (*supra* note 33) and a French proposal.

The full committee (the Second Committee of the conference) took no action on the subcommittee report. It explained that it had been unable to reach agreement on the breadth of the territorial sea:

The questions which that Sub-Committee had to examine are so closely connected with the breadth of the territorial sea that the absence of an agreement on that matter prevented the Committee from taking even a provisional decision on the articles drawn up by the Sub-Committee. These articles, nevertheless, constitute valuable material for the continuation of the study of the question, and are therefore . . . attached to the present report . . .

Id. at 209, 211.

³⁵ In *United States v. California*, 332 U.S. 19 (1947), the Court held that the United States, not the State, had paramount rights in the marginal sea. See *supra* section II. The area adjudicated was described as "lying seaward of the ordinary low-water mark on the coast of California, and

Request of Special Master of June 29, 1949, *United States v. California* (No. 11, Orig.) (U.S. Ex. 85-202, Ak. Ex. 85-63). The issue at this stage was the location of the line between inland waters and the marginal sea along parts of the California coast. One of the questions addressed in the memorandum was as follows:

Question (c). — What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

Id. at 18. In introductory remarks the United States said that this question, as well as another question on bays, "present problems which have international aspects and require a consideration of certain documentary materials reflecting developments in the field of international law." *Id.* at 6. The most important of these, the United States said, were the documents from the Hague Conference, especially the proposals of the United States delegation. *Id.* at 6-7. As to question (c) in particular, the United States said:

It is believed that the answer to this question, like that for question (b), is to be found in the proposals of the United States delegation at the 1930 Conference. The pertinent paragraphs within these proposals are those set forth under sections A, C, F and G, the subjects of the respective sections being stated as General Principle, Islands, Straits, and Simplification and Assimilation. . . .

There was considerable diversity of opinion in regard

outside of the inland waters, extending seaward three nautical miles" *United States v. California*, 332 U.S. 804, 805 (1947) (order and decree).

The United States then petitioned for a supplemental decree ascertaining the precise boundary along certain parts of the California coast. The Court appointed a special master, William H. Davis, to consider this phase of the case. See 334 U.S. 855 (1948); 337 U.S. 952 (1949).

to these matters at the time of the 1930 Conference. . . . However, a partial agreement was reflected in the portions of the Report of the Second Committee dealing with the delimitation of the territorial sea around islands and through straits connecting areas of high sea, and its conclusions in this regard did not differ materially from the recommendations made by the American delegation.

Id. at 19–20. The discussion went on to apply the United States' proposal to the channels under consideration in California. Because of the distance of the islands from the mainland, it concluded that all the intervening water areas were open sea, that they could not be assimilated, and that in any case assimilation was to the territorial sea rather than inland waters. *Id.* at 20–22.³⁶

The second document supporting the official status of the United States' Hague proposal was an aide-mémoire to Norway, dated September 29, 1949. Ak. Ex. 85-82; Ak. Ex. 85-81 (item 6); U.S. Ex. 85-209 (item 3). Here it was stated expressly that the United States was then following its proposals of 1930:

The Department of State acknowledges the receipt of the Aide-Memoire . . . dated September 9, 1949, from the Norwegian Embassy on the subject of territorial waters. The chief developments on the subject in the field of United States Federal legislation, executive pronouncements, and legal decisions since 1929, are as follows:

. . . The Federal Government is now in dispute with the State of California with respect to the location of the

³⁶ Special Master Davis later drew on this memorandum in a preliminary report to the Court in May 1951. *United States v. California*, Report of Special Master William H. Davis (under order of June 27, 1949) (1951) (Ak. Ex. 85-90), reprinted in Reed et al., *supra* note 8, at 15. He acknowledged the United States' position as stated in the 1949 memorandum, but he laid the assimilation method aside as not affecting the issue before him, namely the location of the baseline. *Id.* at 4, 36–37.

boundary line between the territorial sea and inland waters. See *U.S. v. State of California* (decree of October 27, 1947) and case now pending before the United States Supreme Court.

. . . .
With regard to the demarcation of the line separating inland waters from the territorial sea, and to the geographic method of delimiting the territorial sea, the Embassy's attention is invited to the proposals made by the United States Delegation to The Hague Codification Conference of 1930 with respect to the various Bases of Discussion regarding territorial waters there considered A detailed discussion of this method is set forth in Boggs, "Delimitation of the Territorial Sea," 24 *American Journal of International Law* 541 (1930). In its trial brief in the matter of a petition for the entry of a Supplemental Decree in the case of *U.S. v. California* mentioned above, the United States Government today maintains the same method of geographic measurement of territorial waters.

These representations by the United States in 1949 appear to justify the conclusion, which both parties agree to, that the Hague proposals became the official international position of the United States. Under these proposals, the general rule was that offshore islands would have their own territorial sea and that resulting enclaves or cul-de-sacs of high seas would be handled by assimilation to the territorial sea, not by moving the baseline.³⁷ Accordingly, if there was a general

³⁷ In the *Alabama and Mississippi Boundary Case*, Mississippi did not discuss this general rule for offshore islands. Rather, it took the relevant part of the United States' 1930 proposals to be one of the provisions on straits (*supra* page 74):

[W]here a strait is merely a channel of communication with an inland sea, the rules regarding bays apply to such strait.

Brief for the State of Mississippi in Support of Motion for Supplemental Decree (Before the Special Master) at 14–15 (1983) (Ak. Ex. 85-31),

ten-mile rule for islands of which Alaska can take advantage in this proceeding, it must have become the rule after 1949.

c. *The 1940 census*

There is one document that might be thought to cast doubt on the conclusion that the assimilation method was the United States' policy for near-shore islands in the 1940s. This was a monograph prepared in connection with the 1940 census. Malcolm J. Proudfoot, *Measurement of Geographic Area* (U.S. Dep't of Commerce, Bureau of the Census, 1946) (excerpted in Ak. Ex. 85-77 and U.S. Ex. 85-706). The object of the study was to measure or remeasure the areas of states, counties, and smaller civil divisions for the purpose of computing population density. *See id.* at iii, 31-33. To measure areas along the coast, the author used "special adaptations, pertaining to embayments and islands, of the excellent principles established" in Boggs's 1930 paper. Proudfoot, *supra*, at 33. Alaska reads the adaptations for islands as amounting to "no less than the ten-mile rule." AB 59. Special Master Armstrong also quoted from Proudfoot in his 1984 report in the *Alabama and Mississippi Boundary Case*. U.S. Ex. 85-503, *supra* page 30, at 41.

Apart from any details of the rule employed, I must agree with Special Master Armstrong's remark in an earlier report concerning the same census document: "The object of a national census is obviously to determine certain statistical information for the internal use of the nation involved, and not to establish international boundaries . . ." *United States v. Louisiana (Louisiana Boundary Case)*, Report of Special

United States v. Louisiana, 470 U.S. 93 (1985). The State characterized Mississippi Sound as "a channel, or strait connecting two inland seas, i.e., Mobile Bay and Lake Borgne." *Id.* at 41-42.

Alaska has not argued that any of the waters inside barrier islands in the Arctic are "merely a channel of communication with an inland sea."

Master Walter P. Armstrong, Jr. (1974), *supra* page 48 n.14, at 11 (finding that the census line did not constitute straight baselines within the meaning of the 1958 Convention).

Proudfoot's discussion confirms that his results were useful only for statistical purposes. He explained the undertaking and the rules used as follows:

Before measuring the areas of counties, minor civil divisions and cities, it was necessary to decide on the outer limits of the United States and to establish mutually exclusive definitions for land and water. . . .

. . . .
In the latest remeasurement of the United States, three fundamental definitions for land, inland water, and water other than inland water, were established for the first time. . . . [A]rea figures are given to enable users of statistical data to compute densities for comparison. From a statistical standpoint, small bodies of inland water are analogous to land area, but large water bodies are excluded from inland water, in order for densities not to be misleading.

A solution for the problem of setting outer limits for the United States was obtained by special adaptations, pertaining to embayments and islands, of the excellent principles established by S. W. Boggs, Geographer of the Department of State, in delimiting the territorial waters of the United States. These adaptations of Boggs' principles resulted in the following rules for delimiting coastal and Great Lakes water, and thereby, in part, for setting the outer water limits of the United States . . . : (1) where the coast line is regular it shall be followed directly unless there are off-shore islands within ten nautical miles; (2) where embayments occur having headlands of less than ten and more than one nautical mile in width, a straight line connecting the headlands shall set the limits; how-

ever, (3) the coast line shall be followed if the indentation of the embayment is so shallow that its water area is less than the area of a semicircle drawn using the said straight line as a diameter; and (4) two or more islands less than ten and more than one nautical mile from shore shall be connected by a straight line or lines, and other straight lines shall be drawn to the shore from the nearest point on each end island.

Problems pertaining to the treatment of inland water required definitions in harmony with those established for coastal and Great Lakes water and for land. . . . To meet these problems for inland water the same 4 rules were used, but a limit of 1 nautical mile was substituted for the 10 nautical mile limit. In addition, inland water was defined to include: permanent inland water surface, such as lakes, reservoirs and ponds having 40 acres or more of area; streams, sloughs, estuaries, and canals one-eighth of a statute mile or more in width; and islands having less than 40 acres of area.

Proudfoot, *supra*, at 32-33 (footnotes omitted). The rules using ten-mile lines were said to define "state water," which was to be counted in the area of the adjoining state but not in the area of counties or smaller subdivisions. *Id.* at 32 n.96. "Inland water," in contrast, was to be counted in smaller subdivisions as well. *Id.* at 37.³⁸

I find that nothing in the Proudfoot document contradicts the conclusion of the preceding section: that for some period up at least to 1949, the international position of the United States was to treat near-shore islands by the assimilation

³⁸ In a set of maps included with the study, Proudfoot at 38-51, Mississippi Sound and numerous other areas were shown as state water. Chandeleur and Breton Sounds in Louisiana—Alaska's foremost examples of the later use of a general ten-mile rule for islands—were not. *Id.* at 45. Alaska's own coastline was not shown.

method, and not by a general ten-mile rule for claiming waters inside islands as inland.³⁹

4. *United States policy, 1950-1952*

During the period 1950-1952 there were several important events bearing on United States policy for delimiting inland waters. They include, in chronological order, the following:

- a. In Louisiana, the drawing of the so-called Chapman line, a tentative dividing line between state and federal submerged lands.
- b. In the International Court of Justice, the briefing and argument of the *Fisheries Case*, in which both parties, Norway and the United Kingdom, referred to the delimitation practice of the United States. *Fisheries Case (U.K. v. Nor.)*, 1951 I.C.J. 116.
- c. In the California litigation, the submission by the State Department of a general statement on United States policy for delimiting inland waters.
- d. Also in the California litigation, the submission by Special Master Davis of his final report.
- e. In Alaska, a statement by Mr. Boggs, the State Department geographer, on the method of delimiting territorial waters in the Alexander Archipelago.

³⁹ In his 1984 report, Special Master Armstrong cited Proudfoot for a proposition as to islands in the mouth of a bay, not a proposition about islands along an otherwise straight coast: "For purposes of applying the ten mile rule, where islands lie in the mouth of a bay thus creating multiple mouths, each mouth is to be considered separately." U.S. Ex. 85-503, *supra* page 30, at 40. This ties in with Mississippi's theory that, in the United States' 1930 Hague conference proposals, the provision relevant to Mississippi Sound was that providing:

[W]here a strait is merely a channel of communication with an inland sea, the rules regarding bays apply to such strait.

See *supra* note 37.

Alaska relies centrally on item a and secondarily on item b. It makes little of item c and nothing of item d. It finds item e inexplicable. See AB 62-68. I review these events below.

a. *The Chapman line (1950)*

In 1950 the Court held that in Louisiana and Texas, as in California, the Federal Government had paramount rights in the marginal sea and the States did not own the lands beneath. *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950). It then became important to locate the line dividing the marginal sea from inland waters, particularly in Louisiana where the coast was physically complicated and oil production was already under way.

To work out a position on the dividing line, the Department of Justice sought the aid of the State Department and later of the Interior Department and the Coast and Geodetic Survey as well.⁴⁰ The result was the Chapman line (named for Secretary of the Interior Oscar Chapman). According to later documents, the federal interagency work was concluded on October 26, 1950,⁴¹ and charts showing the line were submitted to Louisiana on March 16, 1951.⁴²

The Chapman line covered the entire Louisiana coast,

⁴⁰ See letter from Solicitor General Philip Perlman to Acting Secretary of State James Webb (May 18, 1950) (Ak. Ex. 85-84, U.S. Ex. 85-420); letter from Solicitor General Perlman to Admiral Robert Studds, Director of the Coast and Geodetic Survey (Oct. 3, 1950) (Ak. Ex. 85-58 at 131); 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* 109 n.8 (U.S. Dep't of Commerce Pub. 10-1, 1962).

⁴¹ Letter from Solicitor General J. Lee Rankin to Admiral H. Arnold Karo, Director of the Coast and Geodetic Survey (Feb. 29, 1960) (Ak. Ex. 85-86, U.S. Ex. 85-404).

⁴² Reply Brief for the United States (Sept. 1958) (Ak. Ex. 85-14) at 44 n.23, *United States v. Louisiana*, 363 U.S. 1 (1960).

from the boundary with Texas to the boundary with Mississippi. Alaska refers to the line for its treatment of Chandeleur and Breton Sounds, which extend from the Mississippi River delta to Mississippi Sound. The Chapman line followed the barrier islands that form the sounds, enclosing the sounds as inland waters.⁴³ Alaska reads it as a principal example of the use of the ten-mile rule for islands. It is undisputed that the islands were all less than ten miles apart.

Also material, however, is the theory on which the Chapman line was drawn. As background for examining the theory, it may be well to review the nature of Alaska's position. The State wishes to show that the United States had a practice or a policy of claiming waters behind closely spaced barrier islands as inland waters. Even if the claim was not made specific as to the waters off the Arctic coast, Alaska asserts that the general practice or policy was so well established as to imply such a claim.

To evaluate this argument, it is necessary to consider what general principle the Chapman line exemplified. The answer to that question seems less clear than Alaska contends. There are three sources for the theory behind the Chapman line, and all are different.

(1) *Boggs's theory*

Only one of the sources is contemporaneous with the drawing of the Chapman line in 1950. This is a draft memorandum by Mr. Boggs of the State Department, dated July 6,

⁴³ For a clear map of the Louisiana coast, see *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, facing page 78 (1969). The Chapman line itself, as drawn in 1950, is not in evidence. Two segments of the 1950 line, including only the southernmost portion of Breton Sound, are shown in 1 Shalowitz, *supra* note 40, at 110-11. The Chapman line was slightly revised in 1961, and the 1961 version of the line, insofar as it affected Chandeleur and Breton Sounds, is plotted in Ak. Exs. 85-905, -905a, -906, and -906a.

1950, and marked as for Mr. Robert Vaughan in the Department of Justice. It began:

Because the waters of Chandeaur and Breton Sounds are not extensively traversed by foreign vessels bound for points in Louisiana and Mississippi, and because these sounds are so screened by a chain of islands (covering more than half the total arc of territorial sea from the Chandeaur Islands on the north to the delta coastline on the south), the maximum intervals being less than 10 miles in the north and slightly more than 6 miles in the south, it seems apparent that the waters of these two sounds should be regarded as inland waters, and not as territorial sea. Precise delimitation of these inland waters then becomes necessary.

Ak. Ex. 85-85, U.S. Ex. 85-400.⁴⁴ Although the memorandum is marked "draft," it appears to be the document referred to in a later letter by Solicitor General Rankin, *supra* note 41, which stated:

On July 6, 1950, in response to a specific inquiry in connection with the case of *United States v. Louisiana*, 339 U.S. 699, the State Department advised us that Chandeaur Sound should be considered inland water.

Mr. Boggs's grounds for making Chandeaur and Breton Sounds inland waters were not simply that the islands were less than ten miles apart. His memorandum referred also to the absence of foreign traffic in the sounds and to the fact that the islands covered more than half the total arc of territorial sea.

For the Arctic coast, the parties presented no evidence

⁴⁴ As to the usage of Chandeaur Sound, Boggs also said that the waters "are traversed by shallow draft vessels from Mississippi Sound to the Mississippi, and by ocean-going vessels bound for Gulfport and Biloxi." Ak. Ex. 85-85, U.S. Ex. 85-400 at 2.

about these extra conditions. At Stefansson Sound—the one part of the Arctic coast where there may be enclaves of federal submerged lands—it is doubtful that the last condition holds.⁴⁵

(2) *Clement's theory*

The second version of the theory behind the Chapman line comes from an official of the Bureau of Land Management. Ak. Ex. 85-87, U.S. Ex. 85-402. The document is titled "Memorandum for the Record" and dated June 23, 1954, four years after the original Chapman Line was drawn. The author is Donald B. Clement, Assistant Chief of the Division of Cadastral Engineering.⁴⁶

This memorandum is remarkable for ignoring the problem of offshore islands entirely. Instead, it simply quotes earlier writing as to when an indentation qualifies as a bay, and the paragraphs quoted were themselves only a summary of the United States' proposal at The Hague for bays and estuaries.⁴⁷ Chandeaur and Breton Sounds cannot possibly

⁴⁵ Stefansson Sound is shown, with the possible enclaves, in figure 3.2. The sound runs from about Stump Island to Brownlow Point, inside a series of fringing islands including the Midways, Cross, Narwhal, the McClures, the Stocktons, the Maguires, and Flaxman Island. National Ocean Survey, U.S. Dep't of Commerce, 9 *United States Coast Pilot* 345-47 (9th ed. 1979) (Ak. Ex. 136). *But see* Tr. 2687-88 (speculating about the eastern limit of the sound).

By the Master's measurements, the barrier islands at Stefansson Sound cover not much over a third of its total length. The entire sound, from Stump Island to Brownlow Point, is roughly sixty miles long. Of that distance, Alaska's proposed straight baselines between islands total nearly forty miles. *See* Ak. Exs. 85-920N, -920O, and -920P.

⁴⁶ For this interpretation of the signature (which might be read as "O'Connor"), compare Ak. Ex. 85-170 (items 3 and 4).

⁴⁷ The key paragraphs in Clement's memorandum appear verbatim in the United States' 1949 memorandum to Special Master Davis, *supra* pages 76-77, at 15, and in Special Master Davis's 1951 report to the

have been assumed to qualify as bays in a technical sense. Bays were generally understood to be indentations in the mainland,⁴⁸ but the mainland at Chandeleur Sound, at least, is generally convex. In addition, the United States' Hague proposal had included a semicircle test as one of the main criteria for a bay, but how a semicircle test would apply to waters behind fringing islands was apparently never discussed.⁴⁹ Finally, Mr. Boggs had made it plain that he did not consider the sounds to be bays.⁵⁰

(3) Shalowitz's theory

The third version of the theory behind the Chapman line comes from Shalowitz's book, *Shore and Sea Boundaries* (U.S. Dep't of Commerce Pub. 10-1, vol. 1, 1962). In general this volume appears to be an extremely reliable source,

Court, *supra* page 78 n.36, at 5. The 1949 memorandum, at 14-15, describes them as a summary of the 1930 proposals and refers to Boggs's 1930 paper, *supra* page 71, for more details.

⁴⁸ "Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentations in the mainland . . ." *Louisiana Boundary Case*, 394 U.S. 11, 62 (1969). See also the 1930 drafts on bays described *supra* notes 33-34, pages 74-76.

⁴⁹ Shalowitz stated in 1962: "Within the author's knowledge there has neither been proposed nor developed thus far a geometric rule for determining the status (inland waters or open sea) of water areas between islands and the mainland coast similar to the semicircular rule for bays." I Shalowitz, *supra* note 40, at 161 n.124.

⁵⁰ In his 1950 memo, *supra* pages 85-86, Boggs had suggested "principles in delimiting inland waters which are not *bona fide* bays but which are screened by a series or a chain of islands comparable to those enclosing Chandeleur and Breton Sounds." Later, in a paper that grew out of his work on the Louisiana coastline, Boggs spoke of some areas behind islands as areas that should be considered inland waters "even though there is no approximation to a 'bay' as hitherto considered in the delimitation of the territorial sea." Boggs, *Delimitation of Seaward Areas under National Jurisdiction*, 45 Am. J. Int'l L. 240, 254 (1951) (Ak. Ex. 85-96, U.S. Ex. 85-224).

and it has been so treated by the parties. It has also been cited by the Court in several submerged lands cases.⁵¹

Shalowitz is the source of the statement of the ten-mile rule on which Alaska relies:

When the Chapman line was drawn along the Louisiana coast (*see* Part 1, 731), pursuant to the decision in *United States v. Louisiana*, 339 U.S. 699 (1950), the principle followed in drawing the baseline was that waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were considered inland waters.

I Shalowitz 161.

There are certain difficulties with this statement. It was published some twelve years after the Chapman line was drawn and three years after Alaska became a state. The principle stated is not articulated in the earlier documents regarding the Chapman line. For Alaska to have acquired rights at statehood on the basis of the principle Shalowitz stated in 1962, it would at least have to be shown that such a principle was implicit in prestatehood materials.

In addition, there is an internal inconsistency in Shalowitz's own presentation. The statement just quoted gives an unqualified version of a ten-mile rule for islands. But Shalowitz also says that the Chapman line used principles advocated before the Special Master in the California litigation:

The Chapman line was intended to represent graphically the ordinary low-water mark and the seaward limits of inland waters along the Louisiana coast. Its description

⁵¹ E.g., *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 16 n.7, 66 n.85, 71 n.95 (1969); *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504, 517 (1985); *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 102 n.3, 106 n.9 (1985).

and plotting on the charts represented an effort to apply, as accurately as possible, the principles of delimitation advocated by the United States in the proceedings before the Special Master.

Id. (part 1, sec. 731) at 108. At the time the Chapman line was drawn, these principles were represented by the United States' memorandum of August 1949 (*supra* pages 76-78 and 87 n.47). The principles described in the 1949 memorandum would have conflicted with an unqualified ten-mile rule for islands.

The 1949 memorandum relied in turn on the United States' proposals at the Hague conference. The Hague proposals, as already mentioned, in general treated offshore islands by means of the assimilation method. *See supra* section F(3)(a), pages 71-74. Under that method, Chandeleur and Breton Sounds would have been largely or entirely territorial waters, depending on whether the requirements for assimilation were met.⁵²

Besides the general rule, the 1930 proposals and the 1949 memorandum can be read as providing separately for certain special cases that may involve offshore islands. A flat ten-mile rule for islands would have been inconsistent with these special provisions as well.

The provisions in question dealt with straits. For straits where the same nation holds both coasts, the American proposal in 1930 distinguished between "a strait which connect[s] two seas having the character of high seas" and "a strait [which] is merely a channel of communication with an inland sea." *See supra* page 74. Either type of strait, presumably, could be formed by offshore islands so closely grouped that no entrance would exceed ten nautical miles. A

⁵² Shalowitz treats the assimilation method only in an obscurely placed footnote, 1 Shalowitz 232 n.56.

strait between two parts of the high seas was never to be inland waters. *See id.*

Shalowitz tried to explain the treatment of Chandeleur and Breton Sounds in terms of the rule for a strait leading to an inland sea. The explanation clouds the theory of the Chapman line even further:

These principles [used in drawing the Chapman line] had been developed in international law or had been promulgated by the United States in its international relations. They involved the semicircular rule . . . and the 10-mile rule . . . for bays, and the rule for straits leading to inland waters. The latter situation did not arise in the *California* case. Along the Louisiana coast all islands are so situated in relation to the mainland and to each other as to enclose all waters landward of the islands as inland waters with the result that the islands constitute large segments of the coastline. *Mahler v. Norwich and New York Transportation Company*, 35 N.Y. 352 (1866). Also see Brief for the United States in Support of Motion for Judgment on Amended Complaint 177, *United States v. Louisiana et al.*, Sup. Ct., No. 11, Original, Oct. Term, 1957. The openings between the numerous islands along the Louisiana coast constitute channels leading to inland waters and the rule as to bays becomes applicable . . .

1 Shalowitz 108 n.7.

Shalowitz relies centrally here on the 1866 *Mahler* case.⁵³ *Mahler* did call Long Island Sound an inland sea, mentioning as a reason the distance between islands at its eastern end. But the decision long predates the statements of the

⁵³ The *Mahler* case was described in section F(2)(b). The cited brief for the United States is reviewed below in section F(5)(a); it gives no reasons but merely states the conclusion that waters landward of the Louisiana islands were inland. *See note 81 infra.*

United States' position that were current in 1950, and there is no examination of the case with respect to its current authority, its proper interpretation, or its relation to any later rules.

Shalowitz also invokes the rule for a strait leading to an inland sea, but he departs from what had previously seemed to be its natural interpretation. The United States had proposed in 1930 that, "where a strait is merely a channel of communication with an inland sea, the rules regarding bays apply to such strait." *See supra* page 74. This proposal assumes that a strait is a body of water whose status is to be determined; thus, a strait must be an area and not just a line between headlands.⁵⁴ The proposal also assumes that a strait leads somewhere and that the status of the waters in the strait depends partly on the status of the waters to which it leads. Finally, the proposal says that if a strait leads to waters of the appropriate type, then the waters of the strait itself will have their status determined according to the rules for bays.⁵⁵

⁵⁴ The same assumption appeared in the 1930 proposal on straits between two parts of the high seas, *supra* page 74: under certain conditions, "all of the waters of the strait are territorial waters . . ."

⁵⁵ An example of this pattern of reasoning is available in the *Alabama and Mississippi Boundary Case*. Mississippi said that Mississippi Sound was "a channel, or strait connecting two inland seas, i.e., Mobile Bay and Lake Borgne." *See supra* page 79 n.37. Later Special Master Armstrong found it relevant to inquire whether the ten-mile rule for bays applied separately to each opening between islands or to the lengths of all the openings added together. *See supra* page 83 n.39.

As another possible example, it could have been argued in 1950, when the Chapman line was drawn, that Chandeleur and Breton Sounds formed a strait that was only a channel of communication to Mississippi Sound—which was itself inland water under the Court's 1906 decision in *Louisiana v. Mississippi* (*supra* section F(2)(e)). Such a theory would account for some of Mr. Boggs's comments in recommending that Chandeleur and Breton Sounds be treated as inland waters. *See supra* page 86.

Shalowitz, on the other hand, refers to "the openings between the numerous islands along the Louisiana coast" as forming the relevant straits, and he refers to them as constituting "channels leading to inland waters." By eliminating the distinction between the waters of a strait and the waters with which it communicates, he makes the test for inland waters circular.

Shalowitz also refers to the rule for bays, which set a ten-mile limit on the length of a closing line. For a strait formed by islands, under the natural reading of the 1930 proposal, the ten-mile rule did not come into play unless it had already been found that the strait led only to an inland sea. In Shalowitz's treatment, it is apparently the ten-mile-or-less openings between islands that cause the openings to be straits to an inland sea. This move is a significant extension to the 1930 statements of the rule.⁵⁶ As already noted, the simple ten-mile test is also in conflict with the rule that straits between two parts of the high seas were not to be inland waters, regardless of width, and with the general rule that islands were to have their own territorial seas, subject to some increases in territorial waters by assimilation.

In summary, Shalowitz's explanation of the Chapman line is subject to numerous difficulties; it is only one of three explanations, all different; and it was written long after the fact. On the basis of the materials covered so far, I find that the theory of the Chapman line is far too uncertain to say what result it would have had if applied at Stefansson Sound.

b. *The Fisheries case (1951)*

As evidence for a rule enclosing waters behind closely spaced offshore islands as inland waters, Alaska refers also to the arguments in the *Fisheries Case (U.K. v. Nor.)*, 1951

⁵⁶ Besides the United States' version, quoted in the text, see also the treatment in subcommittee at the Hague conference, *supra* page 75 n.34.

I.C.J. 116. In the *Alabama and Mississippi Boundary Case*, a related contention by Mississippi⁵⁷ was reflected in both the Master's report⁵⁸ and in the Court's opinion, 470 U.S. 93, 106-07 (quoted *supra* page 53).

In the *Fisheries Case*, Norway had laid down a series of straight baselines along its coast north of the Arctic Circle. This coast, called the skjaergaard, is bordered by thousands of islands, islets, and rocks. Norway's baselines joined their outermost points, in several cases by lines more than ten miles long and in one instance by a line of 44 miles.⁵⁹ The United Kingdom complained that the baselines violated international law. The International Court of Justice disagreed. It said:

The Court now comes to the question of the length of the baselines drawn across the waters lying between the various formations of the "skjaergaard". Basing itself on the analogy with the alleged general rule of ten miles relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

In this connection, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters,

⁵⁷ See Mississippi's brief before the Special Master, *supra* page 79 n.37, at 22-26 and its reply brief before the Court, *supra* page 55, at 36-39.

⁵⁸ *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, Report of Special Master Walter P. Armstrong, Jr., *supra* page 30, at 50-51.

⁵⁹ For factual details, an illustration, and general discussion, see I Shalowitz, *supra* page 88, at 67-75.

or ten or twelve sea miles), have not got beyond the stage of proposals.

1951 I.C.J. at 131.

Although the court did not refer to the practice of any particular nation, the parties to the *Fisheries Case* did discuss the views of the United States. Norway described the United States' position in the 1903 Alaska boundary arbitration⁶⁰ and its correspondence during the 1860s on Cuba and the Florida keys.⁶¹ (For a summary of these materials, see *supra* sections F(2)(c)-(d).) Referring to the keys as the "skjaergaard" of Florida, Norway concluded: "In other words, the American system is the same, in this regard, as the Norwegian system."⁶²

It appears to the Master that Norway was not justified, in 1950, in making this assertion that the United States followed a straight baseline system.⁶³ The materials Norway cited dated from 1903 and earlier. It made no reference to the 1930 Hague conference, at which the United States had made different proposals. Most significantly, it made no reference to an aide-mémoire that it had solicited from the State Department in September 1949.⁶⁴ The latter document

⁶⁰ Counter-Memorial of Norway (U.K. v. Nor.), 1951 I.C.J. Pleadings (1 Fisheries Case) 477 (para. 446) (July 31, 1950) (in French).

⁶¹ *Id.* at 484-87 (paras. 461-62).

⁶² "Autrement dit, le système américain est le même, à cet égard, que le système norvégien." *Id.* at 486 (para. 462).

⁶³ Whatever Norway may have believed about United States policy, its beliefs are less directly relevant here than they were in the case of Mississippi Sound. There, the theory was that Mississippi Sound was a historic bay, and the acquiescence of foreign nations was an essential element in that theory. See *Alabama and Mississippi Boundary Case*, 470 U.S. at 101-02, 110-11. Here, the primary question is what policy the United States followed in fact, not how other nations understood the policy.

⁶⁴ The conclusions of this sentence and the preceding one are based on the parts of Norway's argument that have been cited by the parties. The

(quoted *supra* page 78) said expressly that the United States was following its Hague proposals, and it also referred to a paper that distinguished those proposals from the Norwegian system.⁶⁵

The United Kingdom was more careful in its discussion.⁶⁶ It conceded that waters landward of offshore islands could legitimately be treated as inland waters. For the waters landward of Norway's offshore islands, it even conceded that Norway had historic title. The objection of the United Kingdom was that some of Norway's baselines took in waters

Master has not made an independent study of the argument, which is entirely in French and covers several hundred pages.

⁶⁵ The aide-mémoire, *supra* page 78, referred to Boggs's 1930 paper, *supra* page 71. In this paper Boggs had written:

It may be noted, somewhat parenthetically, that . . . a large portion of the coast of Norway will present a unique problem. Much of the fjorded western coast of Norway is fringed with almost countless islands and rocks, and it is exceedingly difficult to indicate exactly which of these meet the requirements of any definition of the term "island" for delimitation purposes, and which rocks do not meet such requirements. Therefore, a navigator could not swing his arc of three-mile radius from the point on the chart indicating his position and readily ascertain whether or not he was in territorial waters or on the high sea. To describe the arcs of circles around all the technical "islands" along the Norwegian "skjaergård" would result in a series of arcs of circles of unusual complexity. For that exceptional coast it would appear that the Norwegian system of indicating arbitrary straight lines as the boundary between the territorial sea and the high sea is not only justified, but practically inevitable, and the further fact that these are rather commonly accepted as "historic" waters tends to eliminate this coast from the operation of the system proposed in the American amendment for general application.

Boggs, *supra* page 71, at 554-55.

⁶⁶ See generally Reply of the United Kingdom (U.K. v. Nor.), 1951 I.C.J. Pleadings (2 Fisheries Case) 535-39 (paras. 332-36) (Nov. 28, 1950); oral argument of the United Kingdom, 1951 I.C.J. Pleadings (4 Fisheries Case) 90-91, 94-95 (Sept. 27, 1951).

seaward of any islands, in part because the baselines were so long. For baselines of that sort, the United Kingdom said, the American precedents provided no authority. In the Alaska boundary arbitration of 1903, closing lines had been limited to ten miles, and at the 1930 Hague conference the United States had "favoured the 10-mile limit both for bays and for straits leading to interior waters."⁶⁷

I do not understand the United Kingdom to state here that every passage between offshore islands, if less than ten miles wide, would in the United States' view have constituted a strait leading to inland waters. The natural reading is that "the 10-mile limit" was just that: a limit. It was clear that a distance of ten miles or less between headlands was not thought by the United States to be a sufficient condition for a bay,⁶⁸ and I am aware of no reason why the distance between

⁶⁷ Reply of the United Kingdom, *supra* note 66, at 539 (para. 336). As to straits leading to interior waters, see *supra* page 74 (the United States' proposal in 1930); page 75 n.34 (the subcommittee report in 1930); page 79 n.37 (Mississippi's interpretation of Mississippi Sound as such a strait); and pages 91-93 (Shalowitz's interpretation of Chandealeur and Breton Sounds in terms of such straits).

⁶⁸ The United Kingdom said, in a passage relating to bays that was quoted by Special Master Armstrong (Report, *supra* page 30, at 50):

It has been disclosed in hearings before a Committee of Congress that the Federal Government is maintaining before the master [in *United States v. California*] that the principles which the United States advocated at the 1930 Conference should be applied in drawing the boundary. . . .

. . . I need not go into the past history beyond recalling that at the 1930 Conference the United States was one of the strongest proponents of the 10-mile limits for ordinary bays, and of the geometrical test of a bay. . . .

. . . my general point is that the Federal Government before the Supreme Court is vigorously maintaining the principles which it

islands would have been thought a stronger circumstance for inland waters than the distance between headlands on the mainland.

Accordingly, I believe that the arguments of Norway and the United Kingdom in the *Fisheries Case* provide no significant support for the claim that the United States consistently treated waters landward of fringing islands as inland waters, provided only that the water crossings were all less than ten miles.

c. *The State Department letter (1951)*

While the *Fisheries Case* was before the International Court of Justice,⁶⁹ the case of *United States v. California* was pending in the Supreme Court before Special Master William H. Davis. As mentioned earlier, the Master made a preliminary report to the Court in May 1951. See *supra* pages 76-78 and nn.35-36. This report described the issues, the positions of the parties, and the evidence they proposed to submit. The Court ordered a briefing on the report, 341 U.S. 946 (June 4, 1951), and subsequently ordered the Master to proceed with hearings, 342 U.S. 891 (Dec. 3, 1951).

advocated in 1930, and that this fact is entirely inconsistent with the Norwegian Government's interpretation of United States practice. It is clear that the Federal Government's views before the Supreme Court are perfectly in line with the United Kingdom's views before this Court.

Oral argument of the United Kingdom, *supra* note 66, at 86, 88, 89. As to the "geometrical test of a bay" (that is, the semicircle test), see *supra* page 74 n.33.

⁶⁹ The *Fisheries Case* was instituted on September 24, 1949, and was concluded with the judgment of December 18, 1951. See Application of the United Kingdom, 1951 I.C.J. Pleadings (1 *Fisheries Case*) 8 (Sept. 24, 1949); *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116 (Judgment of Dec. 18).

In connection with these proceedings, the Justice Department asked the State Department for a statement as to the United States' position. The request was made by a letter of October 30, 1951, from Attorney General J. Howard McGrath to Secretary of State Dean Acheson:

When the matter is heard by the Supreme Court, this Department will desire to present a statement from the Department of State in regard to the position of the United States as to the principles or criteria which govern the delimitation of the marginal sea along the coast of this country and the demarcation of the boundary separating the marginal sea from inland waters. It will be appreciated if we may have such a statement. It is suggested that your statement may appropriately make particular reference to the matter of delimitation in the case of:

- (a) A relatively straight coast, with no special geographic features such as indentations or bays;
- (b) A coast with small indentations not equivalent to bays;
- (c) Deep indentations, such as bays, gulfs or estuaries;
- (d) Mouths of rivers which do not form an estuary;
- (e) Islands, rocks or groups of islands lying off the coast;
- (f) Straits, particularly those situated between the mainland and offshore islands.

Ak. Ex. 85-93, U.S. Ex. 85-203.

The State Department replied in a letter of November 13, 1951, over the signature of Acting Secretary James E. Webb. Ak. Ex. 85-94, U.S. Ex. 85-204, reprinted in 1 Shalowitz, *supra* page 88, at 354. This letter drew on the 1930 Hague documents, but it superseded them as the best available statement of American policy. The State Department reaffirmed the statement early in 1952, explaining that no changes were called for by the December 1951 decision in

the *Fisheries Case*.⁷⁰ Special Master Davis, in his final report in *California* in October 1952, referred to the letters at length and remarked, "I assume that with respect to what the policy of the United States now is in international relations this Court will accept without question the statement of the Secretary of State"⁷¹ The 1951 Webb letter also served as the basis of State Department testimony at congressional hearings in 1953.⁷² It should therefore be understood as a general statement, not just a statement tailored to the facts of the *California* case.

The 1951 letter began by explaining that the State Department "has been and is guided by generally accepted principles of international law and by the practice of other states" 1 Shalowitz, *supra* page 88, at 354. The letter then addressed each of the six listed topics in turn.

The letter did not state a ten-mile rule for islands. Under item e, islands lying off the coast, it simply said that islands had their own belts of territorial sea.⁷³ The main difference

⁷⁰ Letter from Secretary of State Acheson to Attorney General McGrath (Feb. 12, 1952). Ak. Ex. 85-97, U.S. Ex. 85-206, reprinted in 1 Shalowitz, *supra* page 88, at 357.

⁷¹ *United States v. California*, Report of Special Master William H. Davis (1952), at 21, reprinted in Reed et al., *supra* note 8, at 65, and in 1 Shalowitz, *supra* page 88, at 329, 340 (U.S. Ex. 85-205). However, Special Master Davis thought that the central question was the United States' policy on October 28, 1947, the date of the Court's decree in *California*. Report at 22, 1 Shalowitz at 340.

⁷² *Submerged Lands: Hearings on S.J. Res. 13 and Related Bills Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 1051, 1052 (1953) (statement of Jack B. Tate, Deputy Legal Adviser, and Raymund T. Yingling, Assistant Legal Adviser, Department of State).

⁷³ The section on islands dealt largely with the definition of an island. The parts relevant here read:

(e) With respect to the measurement of territorial waters when rocks, reefs, mudbanks, sandbanks, islands or groups of islands lie off

from the 1930 Hague proposals was that the 1951 letter did not mention assimilation as a general method for delimiting the territorial sea in the presence of islands.⁷⁴ One can only speculate about the reason for the omission.⁷⁵

As to item f, straits between islands and the mainland, the letter paraphrased the United States' position at the 1930 conference, and it summarized the subcommittee's report in 1930. As in 1930, the concept of a strait was not defined, but straits were subdivided into two categories. The first, a strait "connect[ing] two seas having the character of high seas," was never inland waters. For the second, "a strait which is merely a channel of communication to an inland

the coast, the United States took the position at the [Hague] Conference that . . . [e]ach island, as defined, was to be surrounded by its own belt of territorial waters measured in the same manner as in the case of the mainland (*Acts of Conference*, 200).

The report of the Second Sub-Committee [at the Hague Conference] defined an island . . . and approved the principle that an island, so defined, had its own belt of territorial sea (*Acts of Conference*, 219).

1 Shalowitz, *supra* page 88, at 355-56.

⁷⁴ That is, the letter contained no counterpart to the United States' 1930 proposal titled "simplification and assimilation," *supra* page 72. The 1951 letter did reflect provisions in the 1930 documents as to assimilation in certain straits. See note 76 *infra*.

⁷⁵ Perhaps the likeliest explanation is that it would have seemed inconsistent with the Chapman line to represent assimilation as the general policy. See *supra* pages 89-90.

As another possible explanation, one might note that Special Master Davis, in his May 1951 report, had already dismissed assimilation as irrelevant to the location of the baseline. See *supra* page 78 n.36. On the other hand, the request by Attorney General McGrath had covered not only the principles governing "the demarcation of the boundary separating the marginal sea from inland waters" but also those "which govern the delimitation of the marginal sea." See *supra* page 99. Assimilation certainly would have been covered by the latter description.

sea," the position was "that the rules regarding bays should apply."⁷⁶

⁷⁶ In the 1951 letter, the entire text on straits was as follows:

(f) The problem of delimiting territorial waters may arise with respect to a strait, whether it be a strait between the mainland and off-shore islands or between two mainlands. The United States took the position at the Conference that if a strait connected two seas having the character of high seas, and both entrances did not exceed six nautical miles in width, all of the waters of the strait should be considered territorial waters of the coastal state. In the case of openings wider than six miles, the belt of territorial waters should be measured in the ordinary way (*Acts of Conference*, 200-201). The report of the Second Sub-Committee supported this position with the qualification that if the result of this determination of territorial waters left an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area could be assimilated to the territorial sea (*Acts of Conference*, 220).

The Second Sub-Committee specified in its observations on this subject that the waters of a strait were not to be regarded as inland waters, even if both belts of territorial waters and both shores belonged to the same state (*Acts of Conference*, 220). In this, it supported the policy of the United States to oppose claims to exclusive control of such waters by the nation to which the adjacent shore belonged. (The Secretary of State, Mr. Evarts, to the American Legation, Santiago, Chile, January 18, 1879, in connection with passage through the Straits of Magellan, I Moore, *Digest of International Law*, 664.) With respect to a strait which is merely a channel of communication to an inland sea, however, the United States took the position, with which the Second Sub-Committee agreed, that the rules regarding bays should apply (*Acts of Conference*, 201, 220).

In connection with the principles applicable to bays and straits, it should be noted that they have no application with respect to the waters of bays, straits, or sounds, when a state can prove by historical usage that such waters have been traditionally subjected to its exclusive authority. The United States specifically reserved this type of case at the Hague Conference of 1930 (*Acts of Conference*, 197).

¹ Shalowitz, *supra* page 88, at 356. As to bays (item c), the main points mentioned in the letter were (1) a ten-mile maximum on the length of a

If there is any basis in the 1951 letter for finding a general policy that waters inside barrier islands are inland waters, it is in this last statement, applying the rules for bays to a strait leading to an inland sea. In the *Alabama and Mississippi Boundary Case*, Special Master Armstrong quoted the statement as relevant to Mississippi Sound. Report, *supra* page 30, at 48-50; see also *id.* at 52.⁷⁷ Nevertheless, the intention behind the statement remains unclear, and the parties have not explored it at any length.

d. *The Master's report in California (1952)*

In federal-state disputes over submerged lands, the problem of coastline delimitation in the presence of offshore islands has arisen repeatedly. California was the first state for which such an issue was litigated. In California, the islands are farther offshore and farther apart than in Louisiana, Mississippi, or Alaska. Therefore, as Shalowitz points out, Special Master Davis had no occasion to consider the California islands as perhaps forming straits leading only to inland waters. ¹ Shalowitz 108 n.7, quoted *supra* page 91.

Nevertheless, the Master's analysis in *California* again makes clear that the distance of islands from the mainland or from each other was not the only determinant of whether waters inside the islands would be inland waters:

Islands Lying Off the Coast

The letter from the Secretary of State of November 13, 1951 says . . . that at The Hague Conference of 1930 the United States took the position that each offshore island

closing line; (2) the need to develop a system assuring that slight indentations would not be treated as bays; and (3) the United States' 1930 proposal as one possibility for such a system. *Id.* at 355.

⁷⁷ Shalowitz had used earlier versions of the statement as part of his explanation of the Chapman line. See *supra* pages 91-93.

was to be surrounded by its own belt of territorial waters, and that this principle was approved in the Report of the Second Sub-Committee.

The rule that the baseline of the marginal belt follows the sinuosities of the coast, except where interrupted by straight-line segments not more than ten miles wide across the mouths of bays, in itself excludes the idea of drawing the coastline from headland to headland around offshore islands. . . . Subject to the special case of historical waters . . . it seems clear enough that the rule stated by the Secretary of State in his letter of November 13, 1951 is and has traditionally been the position of the United States in international relations

Straits

Subject to the special case of historical waters, the position of the United States *as to straits connecting two areas of open sea*, as set forth by the Secretary of State . . . , is that *if both entrances are less than six nautical miles wide the strait is territorial waters but never inland waters*. Otherwise, the marginal belt is to be measured in the ordinary way. *If the strait is merely a channel of communication to an inland sea the ten-mile rule regarding bays should apply*. The channels between the offshore islands and the mainland in the so-called "unit area" claimed by California connect two areas of open sea.

United States v. California, Report of Special Master William H. Davis (1952), at 26-27, *reprinted in* Reed et al., *supra* note 8, and in 1 Shalowitz, *supra* page 88, at 329, 342-43 (U.S. Ex. 85-205) (emphasis added).

The Court had more to say about the islands off California in its 1965 decision. *United States v. California*, 381 U.S. 139 (1965). The immediate point, however, concerns the policy as it was expressed in the early 1950s. Certain straits might be "less than six nautical miles wide" but, all

the same, were "never inland waters." This cannot be reconciled with a rule creating inland waters inside fringing islands if only the water crossings were all under ten miles.

e. The Alexander Archipelago (1952)

Shortly before Special Master Davis submitted his final report in *California*, one other incident took place that contributes to the picture of United States delimitation practice in the early 1950s.

The Commandant of the Coast Guard, Admiral Merlin O'Neill, wrote to Mr. Boggs in the State Department on July 15, 1952. Ak. Ex. 85-102. O'Neill sought advice about certain inquiries from the commander of a Coast Guard district in Alaska. The inquiries arose in connection with Coast Guard "enforcement of certain treaty provisions pertaining to American Fisheries and related matter." One question was:

What are the territorial waters in Alaska and how are they determined? . . . In general, it is assumed that territorial waters in Alaska extend to 3 miles seaward from a line connecting headland to headland regardless of distances between them.

Another question asked in part:

Does the United States have any territorial jurisdiction in the waters of Dixon Entrance?

Dixon Entrance is a body of water at the boundary between the United States and Canada, just south of the Alexander Archipelago.

When Boggs received this letter, he consulted Mr. Vaughan at the Justice Department (the same person with whom Boggs had worked on the Chapman Line). Ak. Ex. 85-99, U.S. Ex. 85-328. Mr. Vaughan responded by supplying some pertinent documents from the *California* case, including a working paper analyzing the 1903 Alaska bound-

ary arbitration. *Id.* For the most part the analysis was similar to that given in the present report (section F(2)(d)).

On August 1, 1952, Boggs replied to Admiral O'Neill. Ak. Ex. 85-101, U.S. Ex. 85-302. In answer to the first question, Boggs used three-mile arcs of circles. He made no reference to the United States' position at the 1903 boundary arbitration, to the Chapman Line, or to the State Department letter of November 1951:

[I]t is the position of this Government that the territorial waters of Alaska are everywhere the waters within the envelope of arcs of circles whose radius is 3 nautical miles, measured outwardly from the coast line, including all islands—properly from the intersection of the line of the low-water datum with the shore. They will therefore not include some of the waters measured "3 miles seaward from a line connecting headland to headland regardless of distances between them"

Boggs also described the 1930 American proposal on bays, and he sent O'Neill copies of his articles.

As to Dixon Entrance, Boggs gave an interpretation of the international boundary and its effect on territorial waters. Then he remarked on islands on each side of the boundary:

It is the position of the United States that the delimitation of the territorial waters in Dixon Entrance conforms to the general 3-mile rule stated above The waters of Dixon Entrance outside the 3-mile limit from the shoreline of Canadian islands are regarded as high seas. The same is true of the waters to the north of the [boundary line], outside the 3-mile limit from Alaskan islands, comprising parts of the waters of Cordova Bay, and of Clarence Strait and Revillagigedo Channel; in the case of the latter two, the pockets of sea to the north of lines four miles long, drawn between the 3-mile envelopes . . . are assimilated to the territorial waters.

This last position was a significant departure from the United States' position on the baseline at the 1903 Alaska boundary arbitration. In 1903, the United States would have closed at least Clarence Strait and Revillagigedo Channel by ten-mile lines, making the waters inside inland waters. See *supra* page 64 n.24 (quoting portions of the 1903 proceedings that mention Clarence Strait specifically); the Justice Department's 1952 working paper on the 1903 proceedings (Ak. Ex. 85-99, U.S. Ex. 85-328), at 5-6 (calling attention to the same passages). For a map attempting to represent the two positions graphically, see Ak. Ex. 85-901C (discussed at Tr. 2635-36, 2717-19, 2737, 2749).

f. Discussion

Alaska has argued that, whatever the previous policy may have been, the United States followed the ten-mile rule for islands for some period of time beginning in 1950. AB 61. By the "ten-mile rule" Alaska means the unqualified version: a policy of enclosing areas between the mainland and off-lying islands as inland waters, provided no entrance to the water areas exceeded ten miles.

The United States agrees that "some form of" a ten-mile rule was used in drawing the Chapman line, but it asserts that this was "not an unqualified principle and most likely would not serve to enclose the waters shoreward of the barrier islands off the North Slope of Alaska." USB 5-6.

The evidence reviewed in this section, covering the period 1950-1952, clearly supports the United States in saying the ten-mile rule was not an unqualified principle. Mr. Boggs, in recommending that the Chapman line close Changleur and Breton Sounds, cited reasons besides the distance between islands. In the most authoritative document of the period, the State Department letter of November 1951, the principle stated was that "[w]ith respect to a strait which is merely a channel of communication to an inland sea . . . the

rules regarding bays should apply" *See supra* page 102 n.76. A ten-mile rule was one of the rules, but not the only rule, regarding bays. No document of the period suggests that a ten-mile rule was to be the sole determinant of whether waters behind near-shore islands were inland waters. Shalowitz, in his later book, does suggest that this is how the Chapman line was drawn, but Shalowitz contradicts himself.

The rule for straits to an inland sea can be traced back at least to the 1930 Hague conference, where it figured in the bases of discussion, the United States' proposals, and the report of the subcommittee that considered these. There were numerous versions of the rule, which differed not only in wording but also in context. For example, sometimes the rule was proposed as an article, and at other times it was stated only in commentary. Sometimes the rule coexisted with other more specific provisions for waters inside offshore islands, and sometimes, as in the 1951 State Department letter, it did not. The available documents say nothing about which changes were intended as changes of meaning. None of the statements of the rule, up to 1952, is anchored to a concrete example of its intended application.

The question remains how the principle for straits to an inland sea would have applied off Alaska's Arctic coast. There are several problems of interpretation, and although I have expressed an opinion on some of them, it may be noted that they have not been briefed. The problems include the meaning of "strait," the meaning of "inland sea," and the meaning of the conclusion that the rules for bays "should apply." The last phrase, for instance, might mean only that the rules for bays are the relevant rules, or it might mean in addition that the rules for bays should be deemed satisfied. There is also a question whether the principle would have been applied to Alaska's Arctic coast at all, given Mr. Boggs's 1952 application of a different principle in the Al-

exander Archipelago, the very place where the ten-mile rule for islands is said to have originated.

In this section I have dealt with materials only up through 1952. I now proceed to the remaining period before Alaska's statehood in January 1959.

5. *United States policy from 1953 to Alaska's statehood*

Alaska asserts that, when it became a state in January 1959, the waters inside its barrier islands in the Arctic would have been considered inland waters under the delimitation practice then prevailing. This practice, Alaska says, followed a rule that offshore islands less than ten miles apart were treated as enclosing inland waters.

In the last section I found that such a rule had not become the United States' policy by 1952. For the period from 1953 forward, the parties have discussed several additional events. The first is the enactment of the Submerged Lands Act in 1953. Alaska would read the Act as placing the "coast line" outside of closely spaced barrier islands and so as making inland waters of any waters inside this coastline. This argument has already been rejected, *supra* section D(2)(b). Congress did not speak to the definition of inland waters when it passed the Submerged Lands Act. *United States v. California*, 381 U.S. 139, 157 (1965).

Alaska refers also to the history of the Alaska Statehood Act, particularly to congressional hearings held in 1955. Again, though, it is already established that Congress meant in the Statehood Act only to apply the Submerged Lands Act to Alaska in the same way as to other states. *See supra* section D(1).

Other developments of the period are considered below. As will appear, they make little change in the previous analysis.

a. *Application of the Submerged Lands Act in the Gulf States*

When the Chapman line was drawn along the Louisiana coast in 1950, its object was to locate the inner edge of the marginal sea. By the Court's 1950 decision, that was the dividing line between state and federal submerged lands. *United States v. Louisiana*, 339 U.S. 699 (1950).⁷⁸

The Submerged Lands Act then granted, to each of the coastal states, a belt of submerged lands extending from the coastline. Initially, both the inner and the outer limits of the belt were open to question. Litigation to determine the extent of the grants began with Louisiana in 1956. *United States v. Louisiana*, 350 U.S. 990 (Mar. 26, 1956) (granting leave to file complaint); *id.*, 351 U.S. 978 (June 11, 1956) (enjoining new development in the disputed area unless by agreement of the parties filed with the Court).

The Chapman line continued to play a role in the new litigation. On October 12, 1956, the parties entered an interim agreement to govern development of the submerged lands. For purposes of administration and accounting, the agreement divided the lands into four zones, which together formed a belt extending from the Chapman line to the edge of the outer continental shelf. Louisiana was given exclusive control over the innermost zone, zone 1, which started at the Chapman line and went out three miles. The agreement contained language, however, that limited the significance of the Chapman line as a boundary:

The submerged lands in the Gulf of Mexico are divided for the purposes hereof into four zones as shown on the plat annexed hereto as Exhibit 'A,' which reflects as a

⁷⁸ More specifically, the Court's decree described the federal lands as "lying seaward of the ordinary low-water mark on the coast of Louisiana, and outside of the inland waters . . ." *United States v. Louisiana*, 340 U.S. 899 (1950).

base line the so-called 'Chapman-Line.' No inference or conclusion of fact or law from the said use of the so-called 'Chapman-Line' or any other boundary of said zones is to be drawn to the benefit or prejudice of any party hereto

United States v. Louisiana (Louisiana Boundary Case), 394 U.S. 11, 73 n.97 (1969). See also *United States v. Louisiana*, 446 U.S. 253 (1980) (interpreting the interim agreement of October 1956); 1 Shalowitz, *supra* page 88, at 130.

In the suit begun in 1956, the object of the United States was to establish that, after the Submerged Lands Act, it still had the rights in submerged lands beyond the three-mile belt. See Brief for the United States in Support of Motion for Judgment (Feb. 1957) (Ak. Ex. 85-6) at 2, *United States v. Louisiana*, 363 U.S. 1 (1960). The United States asked the Court first to determine the width of the belt that the Submerged Lands Act had granted to Louisiana, leaving for further proceedings the question of exactly where the belt began:

On a shelving and tortuous coast such as that of Louisiana, specific identification of the low-water mark and the outer limit of inland waters involves both difficult factual questions of physical observation at every disputed location and legal questions as to the definition of terms and the application of such definitions to particular physical situations. Resolution of these problems with respect to the entire Louisiana coast will be, at best, a protracted process. There are many reasons why the clear-cut legal question of the width of the marginal belt should be answered separately and in advance.

Id. at 159-60; to similar effect *see id.* at 18, 130, 134.

Thus the United States did not address the general problem of identifying inland waters in the initial stages of the Louisiana case. It did, however, reply to one of Louisiana's

arguments by observing that the Court had held Mississippi Sound to be inland waters and by adding that Chandeleur Sound was inland water as well. *Id.* at 128-29 (citing *Louisiana v. Mississippi*, 202 U.S. 1, 48, 50-53 (1906)).

Although the case was briefed and argued in 1957, it did not immediately proceed to judgment. The Court found that the issues were "so related to the possible interests" of the other Gulf States that all the interested parties should be before the Court. *United States v. Louisiana*, 354 U.S. 515 (June 24, 1957). The United States filed an amended complaint in November 1957, naming Texas, Mississippi, Alabama, and Florida as additional defendants. There followed, during 1958, a briefing on the United States' motion for judgment on the amended complaint. In evidence are the United States' brief and reply brief, dated May 1958 and September 1958 respectively. Brief for the United States in Support of Motion for Judgment on Amended Complaint (May 1958) (Ak. Ex. 85-7), *United States v. Louisiana*, 363 U.S. 1 (1960); Reply Brief for the United States (Sept. 1958) (Ak. Ex. 85-14), *United States v. Louisiana*, 363 U.S. 1 (1960).

In the 1958 briefs, the United States took much the same position as in 1957. It repeated that only the width of the belt granted by the Submerged Lands Act to each state was presently at issue and that the location of the baseline should be considered later. Brief of May 1958, *supra*, at 321-22; Reply Brief of September 1958, *supra*, at 53 & n.30.

At the same time, in the course of discussing the seaward boundaries of the states, the United States included several comments to the effect that waters behind offshore islands in Louisiana, Mississippi, and Alabama were all inland waters. Brief of May 1958, *supra*, at 177 (Louisiana), 254 (Mississippi), 261 (Alabama); Reply Brief of September 1958, *supra*, at 43-45, 81, 83. Alaska puts considerable emphasis on

these statements, and it notes particularly that the State Department approved the briefs before they were filed. Furthermore, the 1958 briefs postdated the Convention on the Territorial Sea and the Contiguous Zone, which had been adopted by the United Nations Conference on the Law of the Sea and opened for signature in April 1958.

I cannot give these briefs much weight as evidence of the delimitation policy that the United States would have applied to Alaska's Arctic coast in late 1958 or early 1959. They are subject to at least three difficulties. First, the location of the Gulf States' coastlines was specifically left open for later adjudication. In Louisiana, where the United States' position was based on the Chapman line, the interim agreement said that "no inference or conclusion of fact or law" was to be based on the use of the line. When the Court handed down its decision in 1960, it made clear that it did not take the coastlines as established:

The Government concedes that all the islands which are within three leagues of Louisiana's shore and therefore belong to it under the terms of its Act of Admission, happen to be so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters. Thus, Louisiana is entitled to the lands beneath those waters quite apart from the affirmative grant of the Submerged Lands Act, under the rule of *Pollard's Lessee v. Hagan*, 3 How. 212. Furthermore, since the islands enclose inland waters, a line drawn around those islands and the intervening waters would constitute the "coast" of Louisiana within the definition of the Submerged Lands Act. Since that Act confirms to all States rights in submerged lands three miles from their coasts, the Government concedes that Louisiana would be entitled not only to the inland waters enclosed by the islands, but to an additional three miles beyond those islands as well. *We do*

not intend, however, in passing on these motions, to settle the location of the coastline of Louisiana or that of any other State.

United States v. Louisiana, 363 U.S. 1, 66 n.108 (1960) (emphasis added).

Second, the briefs were based on the United States' delimitation policy as of 1953, when the Submerged Lands Act became law. They did not purport to reflect any changes that might have been called for by the 1958 Convention. The May 1958 brief said, of the width of the marginal belt:

Any change on the international law on the subject, brought about by international agreement after May 22, 1953, is of course immaterial so far as the present case is concerned since, under the Submerged Lands Act, a change in the boundary after the passage of the Act would be ineffective to increase the grant made therein.

Brief of May 1958, *supra* page 112, at 60 n.12. Any changes in the baseline, if brought about by international agreement after May 22, 1953, would probably have been considered equally immaterial.⁷⁹ The State Department's approval of the 1958 briefs, therefore, is not enough to show what the general policy was as of 1958.⁸⁰

Finally, neither the 1958 briefs nor the various documents preceding them explained the theory underlying the concession that waters behind islands in Louisiana, Mississippi, and

⁷⁹ The United States took this position expressly in *United States v. California*, 381 U.S. 139, 164 (1965).

⁸⁰ As to what the general policy actually was as of 1958, see *infra* section F(5)(e). That section also details the evidence regarding State Department approval of the briefs, which comes from a letter dated February 29, 1960, from Solicitor General Rankin to Admiral Karo, director of the Coast and Geodetic Survey. Ak. Ex. 85-85, U.S. Ex. 85-404, quoted *infra* note 102.

Alabama were inland waters.⁸¹ Several officials of the Interior Department had indicated that such waters were inland, usually without giving any grounds for the conclusion.⁸²

⁸¹ It has already been noted that the theory of the Chapman line itself was unclear. See *supra* section F(4)(a). Shalowitz cited one of the briefs in explaining the Chapman line, see *supra* page 91 & n.53, but the material he cited was only a conclusion: "It happens that all the islands on the coast of Louisiana are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters . . ." Brief of May 1958, *supra* page 112, at 177.

⁸² Letter from Secretary Oscar L. Chapman to Governor Wright of Mississippi (Oct. 17, 1951) (Ak. Ex. 85-92, U.S. Ex. 85-501) (Mississippi Sound); memorandum from Acting Solicitor J. Reuel Armstrong to the Secretary of the Interior (Opinion M-36239, Oct. 1, 1954) (Ak. Ex. 85-37, Ak. Ex. 85-335, U.S. Ex. 85-403) (Louisiana); memorandum from Donald B. Clement, Acting Cadastral Engineering Staff Officer, to James D. Parriott, Jr., Associate Solicitor for Public Lands (Dec. 7, 1954) (Ak. Ex. 85-107, U.S. Ex. 85-500) (Alabama); memorandum from the Director, Bureau of Land Management, to Assistant Secretary D'Ewart (June 15, 1956) (Ak. Ex. 85-126) (Alabama).

The only one of these documents to state grounds for considering waters inland was the 1954 Solicitor's opinion, at 3:

[I]t is clear that the term "coast line" [in the Submerged Lands Act] means the line where the land of the State of Louisiana meets the waters of the Gulf of Mexico except that where those waters extend inland between headlands in the form of bays or other inlets the line is that which separates the "inland waters" of the inlet from the main body of water forming the Gulf of Mexico. (Of course, this includes any waters, in the form of a sound, lying inshore from a series of islands which border the coast if the greatest water distance between any two contiguous islands does not exceed 6 miles.)

The Solicitor's use of a six-mile rule for islands seems to be explained by his citation later in the same paragraph to *Louisiana v. Mississippi*, 202 U.S. 1 (1906), and *Manchester v. Massachusetts*, 139 U.S. 240 (1891). See *supra* section F(2)(e).

Although Alaska suggests that the Solicitor meant to say "ten miles," this reading seems unwarranted. It is true, as Alaska notes, that the Solic-

There was no mention of either a ten-mile rule or a rule for straits to an inland sea. The only authorities cited in the briefs were *Louisiana v. Mississippi*, 202 U.S. 1 (1906), which the United States read as holding that Mississippi Sound was inland water, and *Mahler v. Norwich & New York Transportation Co.*, 35 N.Y. 352 (1866), which the United States interpreted as saying—uninformatively for present purposes—“that a boundary will extend out from the shore to embrace those islands which are so situated as to enclose inland waters.” Reply Brief of September 1958, *supra* page 112, at 85. The first case mentioned that the islands in Mississippi Sound were all less than six miles apart; the second, that islands in Long Island Sound were separated by less than five miles. See *supra* sections F(2)(b) and (e). This does not show the existence of a ten-mile rule for islands.

b. Fishing regulations in Alaska

Alaska offers one more category of evidence to show that waters inside fringing islands were claimed as inland waters in the period just before statehood. The principal item is a regulation issued by the Department of the Interior on July 20, 1956, defining the term “waters of Alaska”:

§ 101.19 *Waters of Alaska*. As used in this subchapter, the term “waters of Alaska” includes those waters north and west of the International Boundary at Dixon Entrance extending three miles seaward (a) from the coast, (b) from lines extending from headland to headland across all bays, inlets, straits, passes, sounds and entrances, and (c) from any island or groups of islands, in-

itor also cited Boggs's 1930 paper, *supra* page 71; but that paper, which used the assimilation method for waters behind offshore islands, would not have supported either a six-mile or a ten-mile rule for making such waters inland.

cluding the islands of the Alexander Archipelago, and the waters between such groups of islands and the mainland.

21 Fed. Reg. 5446 (1956) (adding 50 C.F.R. § 101.19).⁸³ The authorizing legislation for this regulation was the White Act, which provided:

That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe.

⁸³ The regulation was reissued, with minor changes of wording, in 1958 and 1959. 23 Fed. Reg. 2503, 2504 (Apr. 17, 1958) (50 C.F.R. § 101.20); 24 Fed. Reg. 2053, 2055 (Mar. 19, 1959) (50 C.F.R. § 101.20). In 1960 the regulation was dropped as superseded by the operation of the Alaska Statehood Act. 25 Fed. Reg. 7681 (Aug. 12, 1960) (notice of proposed revision of fish and wildlife regulations); 25 Fed. Reg. 8397 (Sept. 1, 1960) (revision and reorganization of 50 C.F.R.).

Alaska has referred to the regulation as being republished in 1960. The 1960 version dealt only with the definition of the “North Pacific area,” an area of high seas within which salmon fishing was prohibited to persons or vessels subject to the jurisdiction of the United States. The definition excluded the areas that in 1956 had been called “waters of Alaska”:

For the purpose of the regulations of this part the North Pacific area is defined to include all waters of the North Pacific Ocean and Bering Sea north of 48 degrees 30 minutes north latitude, exclusive of waters adjacent to Alaska north and west of the International Boundary at Dixon Entrance which extend three miles seaward (a) from the coast, (b) from lines extending from headland to headland across all bays, inlets, straits, passes, sounds and entrances, and (c) from any island or groups of islands, including the islands of the Alexander Archipelago, and the waters between such groups of islands and the mainland.

25 Fed. Reg. 8397, 8422 (Sept. 1, 1960) (50 C.F.R. § 210.1).

Act of June 6, 1924, ch. 272, § 1, 43 Stat. 464, as amended by Act of June 18, 1926, ch. 621, 44 Stat. 752 (formerly codified at 48 U.S.C. § 221).⁸⁴

In 1957, the year after the regulation was first issued, two employees of the Bureau of Fisheries prepared charts interpreting the regulations graphically. The authors were Mr. Gharrett and Mr. Scudder, and their interpretation became known as the Gharrett-Scudder line. Several of the charts, including one of the entire Arctic coast, are reproduced in *Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries, Hearing Before the Senate Comm. on Commerce*, 92d Cong., 2d Sess. (1972) (Ak. Ex. 85-23) (pocket supp., nos. 5-10). See also *id.* at 35 (testimony introducing the charts). As Alaska points out, the charts clearly depict straight baselines. As the United States points out, the lines are not limited to ten miles. The chart for the Arctic coast (pocket supp., no. 5) places considerably more submerged land behind the baseline than Alaska claims here.

Alaska notes especially that the State Department later characterized the regulation defining "waters of Alaska" as "adoption by United States of straight baseline method in measuring limits of territorial waters of Alaska." The characterization appeared in three historical studies, published in 1963, of the status of certain waters off the west coast of Canada.⁸⁵ The United States, on the other hand, offers a

⁸⁴ The functions of the Department of Commerce under the White Act were transferred to the Department of the Interior in 1939. Reorg. Plan No. 2, § 4(e), 3 C.F.R. 254, 256 (Supp. 1939), reprinted in 5 U.S.C. app. at 1435, 1436 (1994).

⁸⁵ Historical Studies Division, U.S. Dep't of State, Research Project No. 637A, Status of Dixon Entrance, 1867-1963, at 25 (1963) (Ak. Ex. 85-127, U.S. Ex. 85-230); *id.*, Research Project No. 637, Status of Hecate Strait, 1876-1963, at 19 (1963) (Ak. Ex. 85-128); *id.*, Research Project No. 637B, Status of Queen Charlotte Sound, 1897-1963, at 13 (1963) (Ak. Ex. 85-129).

1962 letter, from Secretary of the Interior Stewart Udall to Secretary of State Dean Rusk, stating that the regulations "defined fishing districts for management purposes only and were not intended to enlarge or extend the territorial waters of Alaska in a legal or jurisdictional sense." U.S. Ex. 85-303; also in Ak. Ex. 85-46, tab 2.⁸⁶

The Court has considered most of this material before. *United States v. Alaska*, 422 U.S. 184 (1975), concerned the status of Cook Inlet, on the southern Alaskan coast. Alaska claimed that the inlet was inland waters on the ground that it was a historic bay. It was agreed that, if the historic bay claim failed, then the disputed part of the inlet was high seas.

In support of the historic bay claim, Alaska sought to show that the United States had exercised sovereignty over Cook Inlet during the territorial period. For this purpose, Alaska relied in part on federal fishing regulations, including the regulations issued under the White Act and interpreted by the Gharrett-Scudder line. See 422 U.S. at 194. Although the Court's opinion did not mention the definition of

⁸⁶ Secretary Udall explained in his letter, U.S. Ex. 85-303:

So far as we can ascertain the regulations have never been invoked against any foreign fishing vessel. The White Act, under which the regulations were issued, does not provide that it shall be applicable to foreign vessels or nationals. The Act of June 14, 1906 (34 Stat. 264; 48 U.S.C. 244-247) had already prohibited alien persons from fishing for any species of fish "in any of the waters of Alaska under the jurisdiction of the United States" except by rod, spear, or gaff. The laws of the United States since 1793 had restricted fishing in American waters to vessels of the United States (46 U.S.C. 251). Since the problem of fishing by aliens had already been dealt with by these acts, the White Act undertook only to regulate fishing by United States citizens within the territorial waters from which aliens had, for all practical purposes, already been excluded. Any regulations promulgated under the White Act could not therefore be considered under any circumstances to be an assertion of territorial jurisdiction against foreign nationals.

"waters of Alaska" specifically, it did include an extended discussion of the Gharrett-Scudder line:

The Gharrett-Scudder line. In 1957 representatives of Canada and of the United States met to discuss the possibility of prohibiting citizens of the two countries from fishing with nets for salmon in international waters in the North Pacific. The delegates generally agreed that the line used by the United States for enforcing fishing regulations under the White Act and related statutes would be used to delimit "offshore waters" for purposes of the joint salmon fishing limitations. Since the Canadian delegates felt that the description of the closing lines connecting headlands in the Alaska fishery regulations were not definitive, they requested a map showing the American line with greater precision. Two United States Bureau of Fisheries employees, John T. Gharrett and Henry Clay Scudder, prepared a chart of the Alaska coast with a line reflecting the boundaries in the then-current United States fishery regulations. This so-called Gharrett-Scudder line enclosed all the waters of Cook Inlet. Charts reflecting the line were transmitted to the Canadian delegates. It is undisputed that the exact location of the Gharrett-Scudder line was determined primarily with reference to the needs of fishery management. The maps were forwarded by the Bureau of Fisheries to the State Department for transmittal to the Canadian delegates with express disclaimers that the line was intended to bear any relationship to the territorial waters of the United States in a legal sense.

....
 ... [T]he Gharrett-Scudder line ... was drawn almost solely with reference to the needs of the coastal salmon net fisheries and was never intended to depict the boundaries of the territorial waters of the United States. Indeed, the very method of drawing the fishery boundaries by use

of straight baselines conflicted with this country's traditional policy of measuring its territorial waters by the sinuosity of the coast. See *United States v. California*, 381 U.S. at 167-169.

422 U.S. at 194-96, 199 (footnote omitted). See also *id.* at 195 n.16 (quoting testimony of Mr. Gharrett, including testimony that the line was not intended to represent the baseline from which the territorial sea was to be measured).

The Court found that the federal fish and wildlife regulations did not imply that the United States was treating the disputed part of Cook Inlet as inland waters. The regulations treated foreign vessels no differently from American vessels, and there was no evidence that they had been enforced against foreign vessels. Enforcement against American vessels in Cook Inlet was not probative, because the United States can enforce fish and wildlife regulations against American nationals even on the high seas. 422 U.S. at 198.

The Court's analysis is controlling here. If the fishery regulations did not amount to an inland-water claim for Cook Inlet, neither did they make such a claim along the Arctic Coast.⁸⁷ Consequently, I can give no weight to the

⁸⁷ If anything, the ground for finding an inland-water claim on the Arctic coast is even weaker. Although both Cook Inlet and the area disputed in the present case were covered by the Gharrett-Scudder line and the definition of "waters of Alaska," Cook Inlet had also been part of a fishing area defined under the White Act ever since 1924. 422 U.S. at 194.

The last condition does not hold for the part of the Alaska coastline disputed here, which extends from Icy Cape (above 70 degrees north latitude) to the Canadian border (near Demarcation Point). In early versions of the White Act regulations, the northernmost fishing area stopped at 66 degrees north latitude. E.g., 50 C.F.R. § 203.1 (1940) (defining the Yukon-Kuskokwim area); 50 C.F.R. § 103.1 (1949) (same). In 1956, when the general definition of "waters of Alaska" was adopted, the northern end of the northernmost fishing area was changed to Point Hope,

statement, made by a State Department official in earlier historical studies, *supra* note 85, that the regulation defining "waters of Alaska" was the adoption of a baseline for the territorial sea.⁸⁸

c. General statements

During the 1950s, while the United States was taking positions on its delimitation policy in the context of the submerged lands cases, it was also participating in international meetings that were a follow-up to the 1930 Hague conference. The first meetings were those of the International Law Commission, which worked on the topic of territorial waters from 1951 to 1956.⁸⁹

which is near 68 degrees north latitude. 21 Fed. Reg. 5446 (July 20, 1956) (amending 50 C.F.R. § 103.1). It was apparently not until 1958 that the area disputed here was brought within a defined fishing area. 23 Fed. Reg. 2503, 2506 (Apr. 17, 1958) (amending 50 C.F.R. § 103.1 to read, "The Arctic area includes all waters of Alaska between Demarcation Point and Cape Newenham").

⁸⁸ A fortiori I can attach no importance to the statement, made in the same studies, that the 1960 regulation defining the North Pacific area (*supra* note 83) was "action by the United States indicative of support for the straight baseline method." Furthermore, the author of the historical studies recognized that his interpretation was contrary to that in Secretary Udall's letter, *supra* note 86 and accompanying text. See Status of Dixon Entrance, 1867-1963, *supra* note 85, at 27-28; Status of Hecate Strait, 1876-1963, *supra* note 85, at 21; Status of Queen Charlotte Sound, 1897-1963, *supra* note 85, at 15.

⁸⁹ The International Law Commission was created, pursuant to a 1947 resolution of the United Nations General Assembly, to promote the progressive development and codification of international law. G.A. Res. 174 (II), 2 U.N. GAOR (123rd plen. mtg., Nov. 21, 1947) at 105, U.N. Doc. A/519 (1948). The Commission initiated work on the topic "régime of territorial waters" in 1951. *Report of the International Law Commission to the General Assembly*, 6 U.N. GAOR Supp. (No. 9) at 17, U.N. Doc. A/1858 (1951), reprinted in [1951] 2 Y.B. Int'l L. Comm'n 123,

The Commission's final report became the starting point for the first United Nations Conference on the Law of the Sea, held at Geneva in 1958. It was the 1958 conference, of course, that produced the Convention on the Territorial Sea and the Contiguous Zone, on whose provisions the United States now relies.

The parties have presented a number of internal State Department memoranda discussing the final report of the International Law Commission. Most relevant here is the memorandum on the Commission's treatment of islands, an 83-page document dated September 1957. Memorandum from Benjamin H. Read to Raymund T. Yingling, "Islands, Drying Rocks and Drying Shoals Under Existing International Law Compared with Articles 10 and 11 of Part I of the Final Report of the International Law Commission on the Regime of the Territorial Sea" (Sept. 1957) (Ak. Ex. 85-30, U.S. Ex. 85-227).⁹⁰ The memorandum undertook to analyze the rules proposed by the Commission, particularly "whether the rules reflect existing international law or prevalent state practice or mere legislation by the Commission," *id.* at 3, and it summarized a great deal of background material.

The Commission's proposed article on islands, article 10, said in relevant part, "Every island has its own territorial sea." In commentary, the Commission mentioned that the article applied "both to islands situated in the high seas and to islands situated in the territorial sea." It also remarked

140, U.N. Doc. A/CN.4/SER.A/1951/Add.1. For the Commission's final report on territorial waters, see note 91 *infra*.

⁹⁰ Other similar memoranda dealt with the ILC's articles 4 and 5 (normal and straight baselines) (Ak. Ex. 85-35); article 6 (outer limit of the territorial sea) (U.S. Ex. 85-225); article 7 (bays) (Ak. Ex. 85-3, U.S. Ex. 85-226); and articles 8 and 9 (ports and roadsteads) (Ak. Ex. 85-132). There may also have been a memorandum on straits, see Ak. Ex. 85-35, *supra*, at 32, but it is not in evidence.

that it had not dealt with the problem of groups of islands but that the article on straight baselines might apply.⁹¹

The State Department memorandum, commenting on this material, found that international law on groups of islands was unsettled. It identified both a "traditional view," which "excluded all special rules for island groups," as well as "two lines of authority contrary to the traditional view The first concerns the unity of islands, called coastal islands herein, and a nearby mainland coast. The second relates to the unity of islands, called 'ocean islands' herein, in a group not near the mainland." Ak. Ex. 85-30, U.S. Ex. 85-227, *supra*, at 11-13. The memorandum characterized the United States, at the time of the 1930 Hague conference, as favoring the traditional view (modified by assimilation). *Id.* at 12. It did not attempt to characterize the United States' position since 1930. *See id.* at 13-17. Had the United States adopted

⁹¹ The commentary stated:

(3) The Commission had intended to follow up this article with a provision concerning groups of islands. Like The Hague Conference for the Codification of International Law of 1930, the Commission was unable to overcome the difficulties involved. The problem is singularly complicated by the different forms it takes in different archipelagos. The Commission was prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject. It recognizes the importance of this question and hopes that if an international conference subsequently studies the proposed rules it will give attention to it.

(4) The Commission points out, for purposes of information, that article 5 [straight baselines] may be applicable to groups of islands lying off the coast.

Report of the International Law Commission to the General Assembly, 11 GAOR Supp. (No. 9) at 15, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 253, 270, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

a ten-mile rule for coastal islands, one would certainly expect to find it reflected in this memorandum.⁹²

The memorandum did quote, without comment, from the first draft of the Restatement of the Foreign Relations Law of the United States. *Id.* at 74-75. Like the 1951 State Department letter, the Restatement described, first, a general rule that waters inside offshore islands were territorial seas or high seas and, second, an exception for a channel of communication to inland waters. Restatement of the Foreign Relations Law of the United States § 6(4) (Tent. Draft No. 1, Apr. 26, 1957). Once again, there was no mention of a simple ten-mile rule for islands.⁹³

⁹² Alaska notes that the memorandum discussed the United States' earlier correspondence on Cuba and also its reaction to a recent Cuban law adopting a ten-mile rule. Of the latter the memorandum said:

Cuban Law Decree No. 1948 of January 25, 1955, stated in article 1 that: "The waters between the coasts of the Island (of Cuba) and all adjacent keys, when the distance between them and between the keys themselves do not exceed 10 miles, are declared interior seas." The U.K. and U.S. protested other portions of this law but asked for clarification of how actual baselines would be drawn under article 1, which has not been forthcoming to date of this writing.

Ak. Ex. 85-30, U.S. Ex. 85-227, *supra* page 123, at 64 (footnote omitted). The United States seems entirely correct in observing that, even if it acquiesced in this claim, the acquiescence would not show that the United States itself followed the same practice.

⁹³ A second Restatement draft, which refined the first somewhat but did not make major changes, was also published before Alaska's statehood. Restatement of the Foreign Relations Law of the United States (Tent. Draft No. 2, May 8, 1958). This document took account of international materials up through the final report of the International Law Commission in 1956. The section of interest was now section 5:

§ 5. Base Line Separating Inland Waters From Territorial Sea

....

(3) The base line may be independent from the low water mark and be determined by a line drawn:

d. Findings on pre-Convention policy

The claim being examined is Alaska's contention that, under the delimitation policies followed by the United States as of January 3, 1959, the waters behind fringing islands along Alaska's north coast would have been considered inland waters. The first issue raised by this claim is whether

(a) Across the opening of a bay, gulf or estuary when its opening does not exceed ten nautical miles, or if it exceeds ten nautical miles, between the outermost points in the opening where the line does not exceed ten nautical miles;

(b) Across the opening of a bay, whatever its width, which by historical usage has been traditionally subjected to the exclusive jurisdiction of the state;

....

(4) When an island or group of islands belonging to a state lies off its coast, the base lines on the mainland and on the island or on each island in the group are determined separately and are not joined together. The strait or sound between the base lines of the mainland and of an island or group of islands, or between the base lines of islands in the group, is territorial sea or high seas, as the case may be, except that it is inland waters if:

(a) It is a channel of communication solely to or from inland waters of the state, and would be inland waters by application of the principles applying to bays; or

(b) By historical usage it has been traditionally subjected to the exclusive jurisdiction of the state.

(5) When the coast of a state is deeply indented and broken up by scatterings of islands, rocks and reefs in its immediate vicinity, and special economic interests of the state have developed by historical usage in the waters in between, the state is entitled to determine the base line by joining certain points on the headlands on the mainland and on the seaward edge of offlying islands, rocks and reefs, provided the resulting base line follows the general direction of the coast.

Comment:

....

c. The rules stated in this Section are in accord with a comprehensive statement of the position of the United States on the subject

the United States did in fact develop such a policy. Substantially all the prestatehood evidence that might support the claim has been reviewed above, along with some of the later interpretation of prestatehood events.

(1) The ten-mile rule

The evidence plainly shows that, as of Alaska's statehood, the United States had not developed a general policy of claiming as inland waters any waters behind islands that satisfied a ten-mile rule. At January 3, 1959, no such general rule had ever been announced as American policy, unless perhaps in the Alaska Boundary Arbitration of 1903. The rule that had been recently stated, in various forms, was a rule for straits to an inland sea. The latter was clearly not equivalent to a simple ten-mile rule for islands.

Besides general statements about the rules, there were also some recent concrete precedents at Alaska's statehood. The United States had conceded that the waters inside fringing islands off Louisiana, Mississippi, and Alabama were all inland waters. But the reasoning behind the concession was obscure, and the United States did not elucidate it in its briefs to the Court. A ten-mile rule for islands was only one

given by the Acting Secretary of State to the Attorney General in a letter dated November 13, 1951....

d. The rules stated in this Section are also in accord with the position taken on the subject by the International Law Commission of the United Nations, except on two points.

The first point concerns the length of the base line which may be drawn across the opening of bays, gulfs and estuaries....

The second point involves the exceptional situation stated in Subsection (5)....

e. For illustrations of the drawing of the base line, see Boggs, *Delimitation of the Territorial Sea*, 24 A.J.I.L. 541 (1930); Boggs, *Delimitation of Seaward Areas under National Jurisdiction*, 45 A.J.I.L. 240 (1951).

of several possible explanations, and the prestatehood evidence does not indicate that such a rule was actually used at the time.⁹⁴ Another possible explanation was the rule for straits to an inland sea, but no one mentioned that rule explicitly in prestatehood documents on the Gulf States.⁹⁵ Yet another variation on the theory was suggested by Mr. Boggs, whose draft memorandum of July 6, 1950, mentioned several factors as contributing to his recommendation to close Chandeleur and Breton Sounds, including the fact that the islands covered more than half the total arc of territorial sea. *See supra* page 85. But Mr. Boggs's reasoning in this memorandum was not reported in any published documents.⁹⁶ And in 1952, Mr. Boggs advised the Coast Guard that it was "the position of the United States" that the territorial sea in the Alexander Archipelago was measured using the assimilation method, not using lines connecting islands. *See supra* page 106.

(2) *The assimilation method*

The evidence also shows, in my opinion, that the assimilation method was not the United States' general policy at Alaska's statehood. It was omitted from the State Department's 1951 letter, *see supra* page 101 and nn.74-75, and

⁹⁴ Shalowitz, writing in 1962, did assert that the original Chapman line was drawn using a simple ten-mile rule for islands. 1 Shalowitz 161, quoted *supra* section F(4)(a)(3). But the only prestatehood statements about how the Chapman line was drawn gave no such clear-cut explanation. *See supra* section F(4)(a)(1)-(2).

⁹⁵ Shalowitz also mentioned this rule in his 1962 treatment. 1 Shalowitz 108 & n.7, quoted *supra* section F(4)(a)(3).

⁹⁶ Boggs did publish a paper in 1951 (*supra* note 50) that was based on his work on the Louisiana coastline. But the reasoning in the paper is different from the reasoning in the memorandum, and, as the United States points out, no one ever cited the 1951 paper as representing official United States policy.

from the Department's 1953 testimony on submerged lands legislation, *supra* page 100 n.72. Whatever the status of Mr. Boggs's 1952 letter, the United States appears to have disavowed the method at the 1958 Geneva conference. Under consideration was a draft article which had been adopted by the International Law Commission and which permitted enclaves of high seas to be assimilated to the territorial sea if they were not more than two miles wide.⁹⁷ The United

⁹⁷ The article read:

*Delimitation of the territorial sea in straits
and off other opposite coasts*

Article 12

1. The boundary of the territorial sea between two States, the coasts of which are opposite each other at a distance less than the extent of the belts of territorial sea adjacent to the two coasts, shall be fixed by agreement between those States. Failing such agreement and unless another boundary line is justified by special circumstances, the boundary is the median line every point of which is equidistant from the nearest points on the baselines from which the breadths of the territorial seas of the two States are measured.

2. If the distance between the two States exceeds the extent of the two belts of territorial sea, the waters lying between the two belts shall form part of the high seas. Nevertheless, if, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may, by agreement between the coastal States, be deemed to be part of the territorial sea.

3. The first sentence of the preceding paragraph shall be applicable to cases where both coasts belong to one and the same coastal State. If, as a consequence of this delimitation, an area of the sea not more than two miles in breadth should be entirely enclosed within the territorial sea, that area may be declared by the coastal State to form part of its territorial sea.

4. The line of demarcation shall be marked on the officially recognized large-scale charts.

Report of the International Law Commission to the General Assembly, 11 GAOR Supp. (No. 9) at 15, U.N. Doc. A/3159 (1956), reprinted in

States proposed an amendment to delete the paragraphs permitting assimilation. It explained in part:

Assimilation of enclaves of any size serves no useful purpose for the coastal State or for shipping interests and could lead to abuse of the principles of the freedom of the high seas.

U.N. Doc. A/CONF.13/C.1/L.116 (Apr. 1, 1958), U.N. Conference on the Law of the Sea, 3 Official Records 243 (in Ak. Ex. 85-135).⁹⁸ Had the United States approved of assimilation in some circumstances that were perhaps not covered by the article, one would have expected the comment to be qualified to reflect the distinction.

(3) Other formulations

Although the evidence does not support a simple ten-mile rule for islands, it does show that the United States enclosed

[1956] 2 Y.B. Int'l L. Comm'n 253, 271, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

⁹⁸ The paragraphs referred to, paragraphs 2 and 3 of the ILC version, *supra* note 97, were in fact dropped. As ultimately adopted in the 1958 Convention, Article 12 reads:

Article 12

1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.

2. The line of delimitation between the territorial seas of two States lying opposite to each other or adjacent to each other shall be marked on large-scale charts officially recognized by the coastal States.

waters behind islands as inland waters on some occasions. The nature of these occasions was further examined in *United States v. California*, 381 U.S. 139 (1965). The United States, in its brief in that case, described the policy in terms of the rule for straits leading to inland waters. It said, however, that the rule was circular:

(e) *Straits leading to inland waters*.—Wherever the United States has insisted on the right of innocent passage through straits, denying them the status of inland waters, the claim has rested on the character of the strait as a passageway between two areas of high seas. No such right is claimed as to a strait leading only to inland waters. Such a strait is treated as a bay. Examples of this have already been discussed, including the straits leading into the Alaskan Archipelago (*supra*, pp. 105–107), straits leading to waters between Cuba and its encircling reefs and keys (*supra*, pp. 103–105), and Chanteleur Sound (*supra*, p. 110; see also, *infra*, pp. 153–155).¹⁰⁵

¹⁰⁵ The proper application of this principle becomes a matter of some difficulty in situations where several straits lead to the same body of inland water; and a circularity is involved in situations where the “inland” status of that body depends on whether its entrances are to be subject to the ten-mile rule or to three-mile marginal belts. It may be that some of the applications have been unduly liberal—for example, in the case of Chanteleur Sound—but this need not concern us here, for, as we shall show, even accepting those liberal applications as correct, they do not reach the situation in California. See *infra*, pp. 151–155.

Brief for the United States in Answer to California's Exceptions to the Report of the Special Master, at 131 (June 1964) (Ak. Ex. 85-16), *United States v. California*, 381 U.S. 139

(1965).⁹⁹ The United States also distinguished Chandeleur and Breton Sounds from the Santa Barbara Channel in California, saying that the latter was a strait between two parts of the high seas:

The Santa Barbara Channel connects the high seas of the Pacific Ocean with other waters which we believe, and the Special Master found, are likewise high seas; and it is actually used as a route for shipping not going to or from local ports. Chandeleur and Breton Sounds, on the contrary, lead nowhere; they are simply an enclosed lagoon in a cul-de-sac of the Gulf of Mexico.

Id. at 154. The Court agreed with this distinction:

By way of analogy California directs our attention to the Breton and Chandeleur Sounds off Louisiana which the United States claims as inland waters, *United States v. Louisiana*, 363 U.S. 1, 66-67, n. 108. Each of these analogies only serves to point up the validity of the United States' argument that the Santa Barbara Channel should not be treated as a bay. The Breton Sound is a *cul de sac*. The Chandeleur Sound, if considered separately from the Breton Sound which it joins, leads only to the Breton Sound. Neither is used as a route of passage between two areas of open sea. In fact both are so shallow as to not be readily navigable.

381 U.S. at 171 (footnote omitted).

Following the Court's characterization, the United States

⁹⁹ The quoted paragraph refers to other parts of the brief discussing the Alaskan Archipelago, Cuba, and Chandeleur Sound. Except for one section of the brief that is described below, the pages cited concerned the rules for bays. They were part of a section aimed at showing that the United States had not used closing lines over ten miles long and that the materials cited by California did not show the contrary. See Ak. Ex. 85-16 at 65, 91.

now describes its pre-Convention policy for enclosing islands, as applied in the Gulf States, as "apparently reserved for situations in which the fringing islands, as compared to the water gaps between them, accounted for a very substantial portion of the closing line ultimately drawn and in which the enclosed waters were shallow and constituted a cul-de-sac." USB 53.¹⁰⁰ The United States gave a similar explanation before Special Master Hoffman in the *Massachusetts Boundary Case*:

[T]he whole thrust of the State Department letters of 1951 and 1952 . . . was to assert that a strait between the mainland and offlying islands should *not* be deemed inland water, *regardless of its width*, unless it is "merely a channel of communication to an inland sea." . . . So understood, the "10 mile rule" to which the Court adverts [in the *Alabama and Mississippi Boundary Case*] was limited to *cul de sac* situations—which would include Mississippi Sound and Chandeleur and Breton Sounds . . . but not Nantucket and Vineyard Sounds.

Supplemental Post Trial Brief of the United States (Before the Special Master) at 4 (1985) (Ak. Ex. 85-333), *United States v. Maine*, 475 U.S. 89 (1986) (Massachusetts Boundary Case). See also Tr. 3573-75.

These statements, from 1964 and later, cast some additional light on the earlier rule for straits leading to an inland sea. First, there is no attempt to give the rule a noncircular

¹⁰⁰ To similar effect is USB 9 n.3: "[T]he only ten-mile fringing island inland water rule ever actually followed by the United States was a very limited one, restricted to dead-end situations involving shallow waters that are substantially sheltered behind a land rampart with relatively minor water gaps." The idea that the water gaps must be relatively small comes from Boggs's 1950 memorandum on the closing of Chandeleur Sound. See Ak. Ex. 85-85, U.S. Ex. 85-400, discussed *supra* pages 85, 128.

reading. Rather, the circularity implicit in Shalowitz's 1962 account, *supra* pages 91-93, is now acknowledged openly. Second, the situations where the rule could be applied are now characterized by the United States as involving cul-de-sacs. This is a reasonable interpretation of the rule, though not a conclusive or authoritative interpretation. If an area partly enclosed by islands was to be treated as inland waters on the ground that it formed a strait leading only to an inland sea, then so should a similar area that led nowhere at all, i.e., a cul-de-sac. The extreme case of a cul-de-sac, of course, would be a bay.

The question arises how the rule for straits to an inland sea, appropriately interpreted, would apply to the disputed areas on Alaska's coast. The United States argues, however, that this question need not be considered at all. Section e treats the United States' argument, and then section f returns to the application of the rule.

e. *The 1958 Convention*

The Convention on the Territorial Sea and the Contiguous Zone was opened for signature on April 29, 1958, and was signed on behalf of the United States on September 15, 1958, before Alaska's statehood. 516 U.N.T.S. 205, 274. The United States argues that, whatever its pre-Convention policy for waters behind fringing islands, it moved to the Convention rules immediately upon signing. Furthermore, the United States says, it did not adopt straight baselines under Article 4 of the Convention. If this is correct, the United States' present policy came into effect in 1958, and the disputed areas were not inland waters at or after Alaska's statehood.

To evaluate this argument, one must recall the position of the United States, as of 1958, in the Gulf States litigation. The United States continued to concede inland-water status

to Chandeleur, Breton, and Mississippi Sounds, but the theory was that it was following the delimitation policy as of enactment of the Submerged Lands Act in 1953. *See supra* page 114. It would have been possible, without inconsistency, to hold to the 1953 position for purposes of the Submerged Lands Act, while moving to the Convention's rules for purposes of current foreign policy.

Whether the United States actually did move to the Convention's rules in 1958 is another question. The Court found in the *Alabama and Mississippi Boundary Case* that the United States adhered to its pre-Convention policy for offshore islands until the Convention was ratified in 1961. *See supra* section F(1). In the later *Massachusetts Boundary Case*, the United States disputed the Court's statement of the content of the policy, but it took no issue with the point about when the policy was changed.¹⁰¹ The exact date gains new importance in the present case, of course, because of the timing of Alaska's admission to the Union.

In the present proceeding the United States cites two items to show that it changed to the Convention earlier than previously supposed. In August 1958, the Assistant Legal Adviser in the State Department, Mr. Yingling, is reported to

¹⁰¹ As noted in the last section, the United States wrote in a 1985 brief to the Special Master that, under the State Department letters of 1951 and 1952, "a strait between the mainland and offlying islands should *not* be deemed inland water, *regardless of its width*, unless it is 'merely a channel of communication to an inland sea.'" Then it added:

So far as we are aware, no general rule for treating waters behind a fringe of islands as inland was proposed by an American official until 1951, and even then somewhat backhandedly, as we have just noted. The position therefore survived barely a decade, the United States having ratified the Convention on the Territorial Sea in 1961

Supplemental Post Trial Brief of the United States (Before the Special Master) at 4-5 (1985) (Ak. Ex. 85-333), *United States v. Maine*, 475 U.S. 89 (1986) (Massachusetts Boundary Case).

have questioned the continued concession of Chandeleur Sound. Ak. Ex. 85-86, U.S. Ex. 85-404, *infra* note 102. In June 1959, the State Department Geographer, Mr. Percy, published an article reporting that he had plotted the territorial sea of the United States using the principles of the 1958 Convention. G. Etzel Percy, *Measurement of the U.S. Territorial Sea*, Dep't St. Bull., June 29, 1959, at 963, 964 (Ak. Ex. 85-138); *id.*, reprinted as Dep't of State Pub. 6879, General Foreign Policy Series 139, at 2 (U.S. Ex. 85-231).

I do not find either event persuasive as to the precise date from which the United States followed the Convention. The Percy article is an exposition, not a policy statement. The Yingling question was answered in the negative. The indications are that Mr. Percy and Mr. Yingling, for the State Department, were at odds for a time with the Justice Department personnel handling *Louisiana*. That falls short of showing that the State Department, in its foreign-policy interpretation of the Louisiana coastline, had definitely diverged from the Justice Department's domestic interpretation.¹⁰² It remains necessary, then, to consider how the

¹⁰² This judgment rests, as does the argument of the United States, on a letter dated February 29, 1960, from Solicitor General Rankin to Admiral Karo, director of the Coast and Geodetic Survey. Ak. Ex. 85-86, U.S. Ex. 85-404. The letter discusses Percy's maps as well as Yingling's question, and it is the best available source for some other aspects of the history as well:

It has come to my attention that Dr. G. Etzel Percy, Geographer of the Department of State, has recently prepared a series of maps intended to show the three-mile limit of the United States, and that the Coast and Geodetic Survey is at present reproducing these maps for official use and public distribution. While the project is undoubtedly a desirable one, the line as drawn by Dr. Percy is inconsistent in some respects with the position already taken by this Department, on the advice of the Department of State, in litigation now pending before the Supreme Court.

One of the chief inconsistencies concerns Chandeleur Sound, Lou-

United States' pre-Convention policy for waters inside near-shore islands would have applied in Alaska.

isiana. On July 6, 1950, in response to a specific inquiry in connection with the case of *United States v. Louisiana*, 339 U.S. 699, the State Department advised us that Chandeleur Sound should be considered inland water. On October 26, 1950, in the same connection, Dr. Boggs, then Geographer of the State Department, joined with representatives of the Department of the Interior and this Department in describing, on that basis, a line, (commonly referred to as the "Chapman Line") to represent the official position of the United States as to the coast line of Louisiana, that is, the base line for the three-mile belt. We followed this position in our brief in support of our motion for judgment on the amended complaint in the related case of *United States v. Louisiana et al.*, No. 11, Original, October Term, 1957, at page 177; a draft of that brief was submitted to the State Department in May 1958, before it was filed, and no question was raised on this point. The position was repeated at pages 43-44 of our reply brief in the same case, a draft of which was likewise submitted to the State Department in August 1958. At that time, Mr. Yingling, Assistant Legal Adviser, did raise a question regarding Chandeleur Sound; but at a conference between him, Dr. Percy, and John F. Davis and George S. Swarth of this Department, it was agreed that we should continue to concede that the Sound is inland water. Because of this concession, it was unnecessary for Louisiana to press certain aspects of its argument as it might otherwise have wished to do.

The case of *United States v. Louisiana, et al.*, was argued last October and is now under submission. The status of Chandeleur Sound has been only indirectly involved at the present stage of the case, but will be directly involved at a later stage, when it may be necessary to define our entire coast line on the Gulf of Mexico. I am sure you can appreciate the undesirability of having it appear that the Government is attempting to escape from the concession that it has made to the Court. While Dr. Percy's maps represent only his personal views and not the official position of the State Department, significance is bound to be attributed to their publication and use by the Coast and Geodetic Survey. It seems quite possible that examination will disclose other problems similar to that of Chandeleur Sound. We have taken this matter up with Mr. Yingling, and he agrees that it is important that the Government adopt a uniform position in these mat-

f. The application of pre-Convention policy in Alaska

I found earlier that, before the Convention, the United States did sometimes enclose waters behind coastal islands as inland waters. Although the circumstances leading to this treatment were not spelled out precisely, it may be that some of the waters behind coastal islands in the Arctic would have been deemed inland waters under any version of the policy. The likeliest cases, however, are not in issue here. Where the islands are close enough together and close enough to shore, the intervening waters are included in the Submerged Lands Act grant to the State, even if they are not inland waters, as part of the three-mile belt along the mainland and around each island. Thus, along the entire coasts of the National Petroleum Reserve-Alaska and the Arctic National Wildlife Refuge, the three-mile belts include all the waters landward of islands.¹⁰³

Where the water gaps are short enough, the outer limit of the Submerged Lands Act grant is also unaffected by the status of the waters behind islands. That is, even if closing lines are drawn across the gaps, the three-mile belt measured seaward from the closing line often includes no more submerged land than a belt measured strictly from low-water mark. Thus, in the National Petroleum Reserve-Alaska, only one of Alaska's proposed closing lines would affect the seaward limit of the three-mile belt.¹⁰⁴ In the Arctic Na-

ters. We intend to proceed as rapidly as possible to work this out with the Department of State. In the mean time, I should appreciate your arranging so that these maps will not be distributed until the position is clarified.

¹⁰³ As to whether any of these submerged lands were withheld from Alaska on other grounds, see *infra* sections VIII and IX.

¹⁰⁴ This line, roughly four miles long, would be drawn across the Ekilukruak Entrance to Elson Lagoon, joining the Tapkaluk Islands to Cooper Island. See figure 1.1; Ak. Ex. 85-920G (NOS chart 16081); AB 24-26.

tional Wildlife Refuge, apparently none of the proposed closing lines is long enough to add any area to the three-mile belt.¹⁰⁵

The central controversy, of course, concerns the submerged lands of the leased area, in particular at Stefansson Sound. Here there are substantial areas that are landward of the islands but more than three miles from any upland. There are also numerous proposed closing lines between islands that are long enough to affect the seaward limit of the three-mile belt. See figure 3.4; Ak. Exs. 85-920L to -920P (NOS charts 16063, 16062, 16061, 16046, 16045); Tr. 2904-14; AB 26-30.

The same geographical features that give rise to the controversy at Stefansson Sound make it at most a borderline case for treatment as inland waters under the United States' pre-Convention policy. Alaska has asserted that Stefansson Sound is a cul-de-sac, AB 98-99, but it has not seriously argued the point. Rather, it insists on the unqualified version of the ten-mile rule for islands. ARB 34 & n.11; Tr. 3588. Such evidence as the record contains indicates that the sound should not be treated as a cul-de-sac in the sense that the Court so described Chandeleur and Breton Sounds. As already noted, Chandeleur and Breton Sounds are more fully enclosed than Stefansson Sound, where the barrier islands cover only about one-third of the total length. See *supra* page 87 n.45. In addition, the *Coast Pilot* describes Stefansson Sound as a useful passage for navigation: "Vessels fol-

¹⁰⁵ The coast of the Refuge extends between Brownlow Point and the Canadian border and is shown, with Alaska's proposed closing lines, on Ak. Exs. 85-920P through -920T (NOS charts 16045, 16044, 16043, 16042, and 16041). Alaska's witness, Dr. Prescott, testified that none of the lines affected the three-mile limit in the Reserve area. Tr. 2913-17. Alaska says in its brief that "one or two" of the lines do "have an appreciable effect on the outer limit" of the three mile-belt, AB 30, but it gives no particulars.

lowing the coast may avoid the heavy ice that is nearly always present off the barrier islands by passing inside the islands by way of one of the deeper entrances."¹⁰⁶ Thus, the sound would probably have been classified as a strait "connect[ing] two seas having the character of high seas"¹⁰⁷ or a strait "which form[s] a passage between two parts of the high sea"¹⁰⁸—not as a body that might be inland waters under the rules for bays.

In conclusion, I cannot regard it as established that the United States would have treated the disputed areas as inland waters at the time of Alaska's statehood. No occasion had

¹⁰⁶ National Ocean Survey, U.S. Dep't of Commerce, 9 *United States Coast Pilot* 345 (9th ed. 1979) (Ak. Ex. 136). This publication contains the following description of the sound:

From the Return Islands to Brownlow Point, barrier islands parallel the coast and are separated from it by *Stefansson Sound*, an extensive lagoon. The mainland is low tundra with very little relief except for three prominent mounds W and SW of Tigvariak Island. The mainland shore consists of low bluffs, up to 35 feet in height, cut by river flood plains and deltas. The barrier islands are low sand and gravel reefs less than 8 feet in elevation; the larger islands have some sparse vegetation. Between the islands are many shoals and bars that are awash. The lagoon between the island and the mainland has depths of as much as 30 feet but also has many areas too shallow for navigation by small boats. The lagoon is 2 to 10 miles wide and extends in a continuous line from the Return Islands to Brownlow Point. Vessels following the coast may avoid the heavy ice that is nearly always present off the barrier islands by passing inside the islands by way of one of the deeper entrances. Ice frequently blocks these entrances, but passage usually can be made through leads.

Id. See also Tr. 3064–65, 3094–95, 3109–10.

¹⁰⁷ The phrase comes from the 1951 State Department letter, quoted *supra* page 102 n.76, and also from the United States' proposals at the 1930 Hague conference, quoted *supra* page 74.

¹⁰⁸ The phrase comes from the report of the Second Subcommittee at the Hague Conference, quoted *supra* page 75 n.34.

arisen that required the United States to take a position on their status. No actual determination had been made. The principles that would govern the determination were vague and, as I shall discuss below, perhaps discretionary. The Court said in its *California* decision in 1965, "Before today's decision no one could say with assurance where lay the line of inland waters as contemplated by the [Submerged Lands] Act; hence there could have been no tenable reliance on any particular line." 381 U.S. at 166. That includes the line of inland waters off Alaska's Arctic coast.

6. Poststatehood developments

Even though the disputed areas had not been established as inland waters by Alaska's statehood, it is conceivable that they became established as inland waters thereafter. Alaska does not suggest that the waters achieved historic bay status, but it does argue that something less than historic bay status is required to make submerged lands part of "a State's recognized territory." Such lands would then become subject to the Court's statement that "a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." *United States v. California*, 381 U.S. 139, 168 (1965).

In the *Louisiana Boundary Case* in 1969, the Court sketched a possible example of such a contraction. If the United States had a "firm and continuing international policy to enclose inland waters within island fringes," and if this was "the consistent official international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana." 394 U.S. at 73 n.97.

Alaska offers two main kinds of evidence from the post-statehood period as tending to show that the United States had a policy of the sort referred to in the *Louisiana Bound-*

ary Case. One line of evidence concerns the further development of the asserted ten-mile rule for islands. The other concerns straight baselines under Article 4 of the 1958 Convention.

a. *The ten-mile rule*

(1) *The Louisiana case, 1960-1961*

On May 31, 1960, the Court handed down its decisions concerning the width of the belt granted by the Submerged Lands Act to each of the Gulf States. *United States v. Louisiana*, 363 U.S. 1 (1960); *United States v. Florida*, 363 U.S. 121 (1960). For Louisiana, the Court found that the belt was three miles wide, not three leagues. The Court acknowledged the United States' concession that the belt would be measured from fringing islands rather than the mainland shore, but it also remarked that it did not intend thereby "to settle the location of the coastline of Louisiana or that of any other State." 363 U.S. at 66 n.108 (quoted more fully, *supra* page 113). The final decree was entered on December 12, 1960. *United States v. Louisiana*, 364 U.S. 502 (1960).

After the 1960 decision, the United States did undertake to settle the location of the Louisiana coastline. A joint federal-state survey of the low-water line—a five-year project—was completed in 1961. See Ak. Ex. 85-170 (the report of the federal-state committee, dated December 20, 1961, and related documents); 1 Shalowitz, *supra* page 88, at 173-80. As to the legal principles to be applied to the low-water line, there were consultations during 1961 that involved the Departments of Justice, State, and Interior and the Coast and Geodetic Survey. It was during these consultations that a ten-mile rule for islands was first clearly stated.

The statement appears in nearly identical letters of early March 1961 from Solicitor General Archibald Cox to the

State Department and the Coast and Geodetic Survey.¹⁰⁹ Cox wrote that the Justice Department was now faced with the problem of giving precise application to the 1960 decision and that, unless agreement could be reached with the States, Justice intended to seek supplemental decrees fixing the coastline. It would begin with Louisiana because there was a great deal of present production there. Cox continued by describing the work done so far on the coastline description, suggesting some principles, raising some questions, and asking for comments:

As a basis for discussion, we have asked the Interior Department to furnish a proposed description of the coast line of Louisiana, based on the joint survey which it has been making with the State. I enclose a copy of the description prepared, in response to that request, by Mr. Donald B. Clement of the Division of Cadastral Engineering, Bureau of Land Management, to which I have added paragraph numbers for convenience of reference. I also enclose a memorandum written by Mr. George Swarth of this Department, commenting on Mr. Clement's proposed description, comparing it with the earlier description known as the Chapman Line and with maps prepared last year by Dr. G. Etzel Percy, the Geographer of the Department of State, and raising certain questions for further consideration.

In supporting our position as to the location of the coast line, it will be necessary to formulate the principles

¹⁰⁹ Letter from Cox to Rear Admiral H. Arnold Karo, Director, Coast and Geodetic Survey (Mar. 6, 1961) (with enclosures) (U.S. Ex. 85-407, Ak. Ex. 85-145); letter from Cox to Abram J. Chayes, Legal Adviser, Department of State (Mar. 3, 1961) (without enclosures) (U.S. Ex. 85-406, Ak. Ex. 85-159). Related exhibits are U.S. Ex. 85-405 (extra copy of enclosures, with additional diagrams) and Ak. Ex. 85-158 (extra copy of enclosures, with additional diagrams and some extraneous material).

on which the description has been developed. I would like to submit for your consideration some statements of principles, derived from various sources, including the letter of November 13, 1951, from Acting Secretary of State James E. Webb to Attorney General J. Howard McGrath and the 1958 Convention on the Territorial Sea and Contiguous Zone. With reference to the 1958 Convention, I should explain that we are not now following its provision recognizing bays as wide as 24 miles at the mouth, because it is our understanding that this rule is regarded as a departure from existing law, and that although ratified by the Senate on May 26, 1960, the Convention will not become operative until 30 days after it has been ratified by 22 nations. Even when it does become operative, we believe that the legislative character of this provision will prevent its having retroactive effect in the pending litigation. Thus a determination based on present principles will still be needed for the purpose of apportioning funds derived from the submerged lands before the effective date of the Convention.

The principles that I suggest are as follows:

....

(g) Waters enclosed between the mainland and off-lying islands which are so closely grouped that no entrance exceeds ten miles in width shall be considered inland waters.

....

There are of course many questions raised by the foregoing propositions or by matters not covered by them. In particular, I should be glad to have your views on the following:

....

(b) Under what circumstances should the coast line depart from the mainland to embrace offshore islands?

....

You will of course recognize that to some extent these questions overlap or represent different aspects of the same problem. No doubt, also, additional points will occur to you which I have not raised.

When you have had an opportunity to consider these various matters, I shall be glad to hear your views on them, or to arrange for a conference between representatives of the State and Interior departments, the Coast and Geodetic Survey, and this Department, if it seems that such a conference would be helpful. . . . I am hopeful that we may be able to present something for the Court to act on before the June recess.

Ak. Ex. 85-407, *supra* note 109.

The Coast and Geodetic Survey replied to Cox's letter on April 18, 1961. The reply consisted of a short letter from Admiral Karo, the Director, and a long memorandum by Mr. Shalowitz. Ak. Exs. 85-149, -150, and -160. Shalowitz divided his memorandum into three parts. The response to Cox's proposed principle g, the ten-mile rule for islands, was in part I:

This principle is concurred in and is in conformity with the principle recommended in Part II, Item (b). It would probably be difficult to make this rule more specific because of the great variety of coastal configurations that might be encountered. Each case would call for a consideration on the merits and an equitable solution arrived at.

Ak. Ex. 85-150 at 4. Part II, item b, was the response to Cox's question b, on the treatment of offshore islands (*supra* page 144):

The coast line should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are suffi-

ciently enclosed to constitute inland waters, or they form an integral part of a land form.

Ak. Ex. 85-150 at 7.¹¹⁰ Finally, part III of the memorandum

¹¹⁰ Shalowitz included several paragraphs of commentary on this recommendation, as follows:

(1) The first part of the recommendation is based on the position of the Government as enunciated in the letter of November 13, 1951 (par. (e)), from Acting Secretary of State Webb to Attorney General McGrath. This was the position taken by the Department of Justice in the *California* case and which the Special Master upheld. Under this part of the recommendation, each island, whether isolated or part of a group, would carry its own territorial belt. This is readily understood and easy to apply, and no additional rules are necessary, such as the ratio of the area of an island to the water area between it and the mainland. Where an island is within the territorial sea, drawing the coast line so as to embrace the island would have little effect on the extent of the intervening submerged lands. For any other situation, there is greater reason why they should be excluded from the coast line.

(2) The second part of the recommendation (the exceptional part) deals with situations characteristic of the Louisiana coast and did not arise in the *California* case. It was the basis for drawing the Chapman Line and is in conformity with the concession made by the Government in its Brief in the *Louisiana* case (p. 177).

(3) When the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone becomes operative and it becomes permissible to take coastal islands into account for the purpose of drawing straight baselines between appropriate points but which "must not depart to any appreciable extent from the general direction of the coast," the difficulty of laying down specific rules for applying the general criteria of the convention should be recognized. The ultimate solution may lie in studying each case on the basis of the general criteria, but using the skjaergaard coast of Norway as the limiting condition of conformity to the criteria.

(4) Insofar as determining which islands form part of a land form and which do not, no precise standard is possible. Each case must be considered within the framework of the principal rule. One indication of homogeneity might be a common low-water line.

Ak. Ex. 85-150 at 7-8.

contained Shalowitz's comments on the enclosures to Cox's letter, namely, the Interior Department's draft of a boundary description and the Justice Department's comments on the draft. One of Shalowitz's comments is notable for providing an example of islands which would satisfy a simple ten-mile rule but which he considered to be neither a portico to the mainland nor part of a land form:

A modification of the BLM description is recommended so as to include in the coast line only the unnamed island nearest the easterly headland of Redfish Bay. This follows the Chapman Line and is in conformity with the principle established in Part II, Item (b). The comment by Mr. Swarth that if any of the islands are to be included then perhaps all should be included, does not necessarily follow when considered in the light of the Commentary to Item (b) of Part II.

Id. at 28 ("call 66"). See also U.S. Ex. 85-416 (map showing Redfish Bay and the islands referred to). Thus, even Shalowitz did not apply an entirely unqualified ten-mile rule.¹¹¹

The discussion of the description of the Louisiana coastline continued into the summer of 1961. Representatives of all the concerned agencies met on April 28;¹¹² a revised description was circulated on May 2;¹¹³ the agencies com-

¹¹¹ In his 1962 book Shalowitz described his "portico" recommendation as an "amplification of the [ten-mile rule] . . . recommended so that it would be of general application." 1 Shalowitz, *supra* page 88, at 161. The notion of a portico was elaborated only by a figure, which could equally well be described as showing a fringe of islands. *Id.* at 162.

¹¹² See Cox's letters of May 2, 1961, *infra* note 113.

¹¹³ Letter from Solicitor General Cox to Admiral Karo (May 2, 1961) (including revised description) (Ak. Ex. 85-151); Letter from Cox to Legal Adviser Abram Chayes (May 2, 1961) (Ak. Ex. 85-162 [the letter] and 85-161 [the description]).

mented again;¹¹⁴ yet another revision was sent out on June 29;¹¹⁵ the State Department and the Coast and Geodetic Survey sent their final comments, generally agreeing to the description, early in July.¹¹⁶ The final version of the description continued to close Chandeleur and Breton Sounds. Ak. Ex. 85-153, *supra* note 115, paras. 83-93. It also listed five places along the coast (including Redfish Bay, mentioned above) where islands were treated individually, the coastline being "the ordinary low water line around each island." *Id.*, paras. 94-98.

During these discussions, the State Department took the view that the coastline description should conform to its international policy. It said in connection with another point (the treatment of jetties):

While the sovereign rights in the submerged lands involved in this litigation undoubtedly belong to the United States under international law, and while the division of those rights between the Federal and State Governments is a matter of domestic law, it is the Department's view that questions related thereto should be resolved consis-

¹¹⁴ Letter from Admiral Karo to Solicitor General Cox (May 8, 1961) (Ak. Ex. 85-152); memorandum from G. Etzel Percy to Raymund T. Yingling (May 18, 1961) (Ak. Ex. 85-163, U.S. Ex. 85-410); letter from Acting Legal Adviser Leonard C. Meeker to Solicitor General Cox (May 22, 1961) (Ak. Ex. 85-165, item 2). See also memorandum from Frank J. Barry, Solicitor, Department of the Interior, to Director, Bureau of Land Management (May 16, 1961) (U.S. Ex. 85-409) (requesting review of the May 2 description).

¹¹⁵ Letter from Solicitor General Cox to Admiral Karo (June 29, 1961) (Ak. Ex. 85-153) (including description); letter from Cox to Legal Adviser Chayes (June 29, 1961) (Ak. Ex. 85-157, U.S. Ex. 85-411) (without description). The date of the Cox-Chayes letter is not legible on the letter itself but is taken from Chayes's reply, *infra* note 116.

¹¹⁶ Letter from Charles Pierce, Deputy Director, Coast and Geodetic Survey, to Solicitor General Cox (July 7, 1961) (Ak. Ex. 85-154); letter from Legal Adviser Chayes to Cox (July 5, 1961) (Ak. Ex. 85-164).

tently with international law, and with policies of the United States Government in the international field.

Letter from Acting Legal Adviser Leonard Meeker to Solicitor General Cox (May 22, 1961), *supra* note 114, at 2. Dr. Percy, in a memorandum on the description circulated May 2, wrote, "Extension of baseline along islands to include Chandeleur Sound has been questioned." Ak. Ex. 85-163, U.S. Ex. 85-410, *supra* note 114.¹¹⁷ Meeker enclosed the memorandum in his May 22 letter to Cox. Cox replied, however, "[T]his was originally done on the advice of the State Department, and we feel we are now committed to it in this litigation." Letter from Cox to Legal Adviser Abram Chayes (June 29, 1961), *supra* note 115.¹¹⁸

¹¹⁷ For earlier questionings of the treatment of Chandeleur Sound, in 1958 and 1960, see *supra* page 136 n.102.

¹¹⁸ To similar effect were the comments prepared by Mr. Swarth of the Justice Department and enclosed with Cox's letter of March 1961, *supra* note 109. Mr. Swarth wrote:

The Chapman Line continued along the delta, crossing Grand Bay to the north headland, then to the south tip of Bird Island, along the east side of Bird Island, and to the west tip of Breton Island. The east headland of Main Pass has now extended northward so that the direct crossing to Breton Island is about 6 1/2 miles. Dr. Percy does not cross at all, but continues along the delta and St. Bernard Peninsula, drawing a separate line around the Chandeleur Islands and the other screening islands. He thus leaves Chandeleur Sound as high seas, open at both ends. We are no longer in a position to accept Dr. Percy's view, since we conceded to the Supreme Court (on the advice of the State Department) that Chandeleur Sound is inland water (U.S. Brief 177).

U.S. Ex. 85-407, Ak. Ex. 85-145, *supra* note 109, enclosure 2, at 7, para. 77. Shalowitz seems to have taken the Justice Department's commitment to be even broader. In his April 18 memorandum he wrote, "[T]he Chapman Line delineation forecloses the use of a more restrictive line in areas where no changes have occurred since the line was drawn . . ." Ak. Ex. 85-150, *supra* page 145, at 20 (discussing Caillou Bay).

I do not find that these events of 1961, considered either alone or as a further development of the earlier policy, establish a simple ten-mile rule for enclosing waters behind islands as inland waters. The description did not follow such a rule consistently, and the qualifying condition, that the islands must "form a portico to the mainland," was left entirely metaphorical.¹¹⁹

Even more importantly, where the description did enclose waters behind fringing islands, as at Chandeleur Sound, it still did not purport to follow a rule that would be generally applicable in the future. It was recognized that the Convention provided rules different from those used for Louisiana. Furthermore, President Kennedy had ratified the Convention on March 24, 1961—between the dates of Cox's original letters and of Shalowitz's reply. Both Cox and Shalowitz evidently thought that the significant event would be the Convention's entry into force, not its ratification, but they recognized that the Convention would become the governing document for future foreign policy.

Accordingly, the treatment of Chandeleur and Breton Sounds in 1961 cannot be interpreted as expressing, in the language of the *Louisiana Boundary Case*, a "firm and continuing international policy to enclose inland waters within island fringes." 394 U.S. at 73 n.97. Rather, the 1961 line is best understood as it was explained at the time: as adherence to an earlier commitment. The ten-mile rule and portico principle, offered in justification of the treatment, were a further development of pre-Convention policy, which was then thought to govern the interpretation of the Submerged Lands Act. As pre-Convention policy applied after the Convention had been ratified, the principles behind the 1961 line

¹¹⁹ The phrase "portico to the mainland" comes from *The Anna*, 165 Eng. Rep. 809, 815 (Adm. 1805), but that case does not help to explain the metaphor.

in Louisiana cannot be understood as general enough to support a claim in an entirely different location, such as Alaska.

Indeed, the Court has held that the 1961 line and its predecessors did not bind the United States even as against Louisiana. In the later *Louisiana Boundary Case*, 394 U.S. 11 (1969), the Court rejected an argument that the United States was estopped from changing its position.¹²⁰ One area affected by this ruling was Caillou Bay, which had been enclosed as inland waters under the Chapman Line and the 1961 line.¹²¹ Ultimately it was found to be not a true bay but only an area behind an island fringe and, as such, not inland waters for purposes of the Convention or the Submerged Lands Act.¹²² A fortiori, the principles used in drawing the

¹²⁰ In discussing "areas between the mainland and fringes or chains of islands along the coast," 394 U.S. at 66-67, the Court said:

Louisiana . . . contends that the United States is estopped from denying the "inland water" status of such areas by its concession in earlier stages of this litigation that the areas between the mainland and all the offshore islands were inland waters. We took note of this concession in *United States v. Louisiana*, 363 U.S. 1, 67 n.108

. . . .

As we stressed in that case, this Court has placed no imprimatur on that position. Nor do we think the United States is bound by it. Louisiana has not relied to its detriment on the concession, which appears to have been made primarily for purposes of reaching agreement on the leasing of the submerged lands pending a final ruling on their ownership. The Interim Agreement of 1956 specifically recognized that neither party would be bound by its positions

394 U.S. at 73 n.97.

¹²¹ For the treatment of Caillou Bay up to 1961, see the enclosures to Cox's letter of March 1961, *supra* note 109 (specifically paragraphs 19-21 of Mr. Clement's draft description and of Mr. Swarth's comments); Mr. Shalowitz's comments of April 1961, *supra* page 145, at 19-20; and the description of June 29, 1961, *supra* note 115, at paragraphs 19-21.

¹²² See 394 U.S. at 66 n.87 (noting the issue as to the proper treatment of Caillou Bay); *United States v. Louisiana (Louisiana Boundary Case)*,

1961 Louisiana coastline cannot have made Stefansson Sound irrevocably inland waters.

(2) *The California case, 1963-1965*

Despite the extensive work during 1961 on the Louisiana coastline description, it was not until 1965 that the Justice Department moved for a first supplemental decree fixing parts of the offshore rights in Louisiana. Meanwhile, the *California* litigation came back to the fore.

The case had been inactive for several years. The Special Master had made his report in 1952, agreeing with the United States that waters landward of offshore islands in California were not inland waters. *See supra* section F(4)(d). Both parties filed exceptions to the report, but in May 1953, before any further action was taken, Congress passed the Submerged Lands Act. The Act gave California the submerged lands out to three miles offshore, and this was enough to resolve the practical questions between the parties for the time being. *See United States v. California*, 381 U.S. 139, 142-149 (1965).

By 1963, with improved drilling technology, it became important to determine the full extent of the Submerged Lands Act grant to California. The Court granted leave for the United States to file a supplemental complaint, and it authorized both parties to file new exceptions to the 1952 Master's report. 375 U.S. 927 (Dec. 2, 1963).

A significant part of the dispute in 1963 concerned the standards to be applied in interpreting the term "inland

Report of Special Master Walter P. Armstrong, Jr., at 49-52 (1974) (U.S. Ex. 85-415), reprinted in Reed et al., *supra* note 8, at 181, and in 59 I.L.R. 249 (finding Caillou Bay not a bay and so not inland water); *United States v. Louisiana (Louisiana Boundary Case)*, 420 U.S. 529 (1975) (accepting the Master's report).

waters" in the Submerged Lands Act. Before the Act, Special Master Davis had taken the relevant definition to be that used by the United States in the conduct of its foreign affairs as of October 27, 1947, the date of the first *California* decree. *See* 381 U.S. at 143-44, 163. The United States argued that the Submerged Lands Act used "inland waters" in almost the same sense, the only difference being that the relevant date was now May 22, 1953, when the Submerged Lands Act was approved. *See id.* at 149, 164. California argued that the Act used "inland waters" in an entirely different sense. *Id.* at 149. It also argued that if international law principles did apply, they should be the principles of the Convention. 1 Brief in Support of Exceptions of the State of California to the Report of the Special Master Dated October 14, 1952, Pursuant to Court Order of December 2, 1963, at 70, *United States v. California*, 381 U.S. 139 (1965).

The Court agreed with California's secondary contention, that the Convention's definition of inland waters should be applied. It noted that the Convention had gone into force on September 10, 1964; it characterized the Convention as providing the "best and most workable definitions available"; and it adopted these definitions for purposes of the Submerged Lands Act. *United States v. California*, 381 U.S. 139, 164-65 (1965) (quoted *supra* page 17).

The Court then turned to subsidiary issues, *id.* at 167. It rejected California's contention that it was entitled to use straight baselines around its offshore islands under Article 4 of the Convention. *Id.* at 167-68; *see supra* section E(1). Next the Court went on to Article 7, which increased the maximum bay closing line to twenty-four miles. After dealing with bays proper, 381 U.S. at 169-70, it considered an area inside offshore islands that California said formed a "fictitious bay." This area, the Santa Barbara Channel, would not have satisfied a ten-mile rule for islands, but it

would have satisfied a 24-mile rule,¹²³ and this was the gist of the fictitious bay claim.¹²⁴

The Court found it unnecessary to decide whether international law recognized a principle of fictitious bays. 381 U.S. at 170 n.38. It also found it unnecessary to decide whether some other principle precluded the fictitious bay claim.¹²⁵ The controlling point was that, as with straight baselines, the United States had discretion not to make such a claim:

The United States has not in the past claimed the Santa Barbara Channel as inland water and opposes any such claim now. The channel has not been regarded as a bay either historically or geographically. In these circumstances, as with the drawing of straight base lines, we hold that if the United States does not choose to employ the concept of a "fictitious bay" in order to extend our international boundaries around the islands framing Santa Barbara Channel, it cannot be forced to do so by California.

Id. at 172. The Court distinguished Chandealeur and Breton

¹²³ The channel was 11 miles wide at one end and 21 miles at the other. 381 U.S. at 170 n.38. The distances between islands were smaller. See map, 381 U.S. facing page 213 (Black, J., dissenting).

¹²⁴ "California asserts that the Santa Barbara Channel may be considered a 'fictitious bay' because the openings at both ends of the channel and between the islands are each less than 24 miles." 381 U.S. at 170 (footnote omitted).

For background on the concept of a fictitious bay, see *id.* at 170 n.38. See also U.S. Ex. 85-228 (the International Law Commission documents in which the concept was first proposed in 1953).

¹²⁵ The principle in question was that "a country could not claim a strait as inland water if, in its natural state, it served as a useful route for international passage." 381 U.S. at 172, citing the *Corfu Channel Case*, 1949 I.C.J. Rep. 4. The application of the principle was uncertain because the evidence showed that the Santa Barbara Channel was useful for navigation but not whether the ships using it were international. 381 U.S. at 171.

Sounds both geographically and as areas that the United States did claim as inland waters. *Id.* at 171 (quoted *supra* page 132).

Alaska suggests that "had the water distances [in *California*] been less than 10 miles, it is virtually certain that California would have prevailed" AB 175 n.38. I disagree. The Court's reasoning in *California* did not depend exclusively on the geographical differences between the Santa Barbara Channel and the Louisiana sounds. It depended also, at least as importantly, on whether an inland-water claim to a particular area had in fact been made. The United States has not made such a particularized claim to Stefansson Sound or the other disputed areas in the Arctic.

(3) *The Louisiana case, 1965*

Although the Court ruled in *California* that "inland waters" in the Submerged Lands Act should be interpreted according to the Convention, Alaska argues that the United States continued to follow a ten-mile rule for islands even after that decision. In support of this assertion, Alaska refers to a motion filed in *Louisiana* in November 1965, six months after the *California* decision. Motion by the United States for Entry of a Supplemental Decree (No. 1), Proposed Supplemental Decree, and Memorandum in Support of Motion (filed Nov. 23, 1965) (Ak. Ex. 85-167). The motion was granted and the decree entered on December 13, 1965. *United States v. Louisiana*, 382 U.S. 288 (1965). See also Ak. Ex. 85-189 (preliminary correspondence).

The 1965 motion and decree reflected changes in the positions of both parties since the interim operating agreement of 1956 (*supra* section F(5)(a)). On the seaward side of the areas covered by the 1956 agreement, Louisiana's claims had been reduced by the Court's 1960 ruling that the State did not receive a three-league grant. On the landward side, the United States had recognized that certain additional areas

were included in the Submerged Lands Act grant to Louisiana. Some of the additions resulted from applying the Convention, as required by *California*: new rules affected the treatment of bays, jetties, and low-tide elevations. Other additions resulted from recent surveys of the low-water line. The object of the motion was to establish the exclusive rights as to these areas, where it was said there was no longer any basis for controversy, and to release the funds derived from them that had been impounded under the interim agreement of 1956. See Ak. Ex. 85-167, *supra*, at 1-2 (the motion), 12-19 (the supporting memorandum).

The United States made clear, in its supporting memorandum, that it was continuing to concede Chandeleur and Breton Sounds as inland water. The Chandeleur Islands, the United States indicated, were the only location where it did not contend for a coastline landward of that claimed by Louisiana. Ak. Ex. 85-167, *supra*, at 13-14, 17.¹²⁶ At Breton Sound, the United States said that it was recognizing a coastline farther seaward than the Chapman line as a result of more detailed subsequent surveys. *Id.* at 19.¹²⁷ In the

¹²⁶ The decree described a line, including the uncontested stretch from Chandeleur Island to Errol Shoal, representing the most seaward line claimed by either party as the coastline; and it awarded lands more than three miles outside that line to the United States. 382 U.S. at 288. It did not adjudicate the status of Chandeleur Sound itself.

¹²⁷ In earlier versions, the coastline at the mouth of Breton Sound was described as going from Breton Island to Bird Island and thence to Main Pass. See I Shalowitz, *supra* page 88, at 111; Ak. Exs. 85-905 and -905a. The new version used a line that joined Breton Island and Main Pass directly, as is shown in Ak. Ex. 85-905b. Although the exhibit dates the new version to 1968, the line appears to be the same one described in the 1965 motion. The United States later explained:

In 1950, in drawing the Chapman Line, the United States closed the entrance to Breton Sound by the shortest lines then possible: . . . a total of 7 miles.

By the time of the joint mapping project in 1959, the eastern head-

decree, the area newly agreed to be within three miles of the coastline at Breton Sound was awarded to Louisiana. 382 U.S. at 292.

In taking these positions on the coastline, the United States said nothing of the possible relevance of the Convention to the inland water status of Chandeleur and Breton Sounds. In light of the *California* decision, this absence seems surprising. On the other hand, the Court in *California* had also mentioned a description of the two sounds as areas that the United States claimed as inland waters. 381 U.S. at 171, quoted *supra* page 132.

Whatever the effect with respect to Louisiana of the United States' continued concession, I find that the 1965 motion adds no more to Alaska's case than did the 1961 treatment of Chandeleur and Breton Sounds. Even assuming, arguendo, that these events did express a "firm and continuing international policy to enclose inland waters within island fringes" at Breton and Chandeleur Sounds, they were later found not to express such a policy even for the rest of the Louisiana coastline.¹²⁸ Therefore they cannot be read as extending such a policy to Alaska.

land of Main Pass had extended itself to within 6 miles and 276 feet of the southern shore of Breton Island, and its growth appeared to be continuing. This crossing was already shorter than that used in the Chapman Line. The three-mile belts from the two sides probably would meet within the near future, as soon as Main Pass extended itself another 276 feet. Consequently, we concluded, purely as a practical method of rounding out our concession, that the shorter crossing should be substituted for the Chapman Line. . . .

Brief for the United States 126-27 (Aug. 1968) (Ak. Ex. 85-36, U.S. Ex. 85-901), *United States v. Louisiana*, 394 U.S. 11 (1969).

¹²⁸ See the discussion of Caillou Bay, *supra* page 151.

b. Article 4 straight baselines

The discussion so far has eliminated almost every path by which Alaska might prevail on the baseline issues. The evidence did not establish that the disputed submerged lands were considered inland waters at Alaska's statehood. For areas more than three miles from low-water mark, neither did it show that they were territorial waters at statehood.

After Alaska's admission to the Union, there were some further developments regarding the evolution of a policy for coastal islands, but these too were insufficient to give Alaska a claim to the disputed submerged lands. The poststatehood events reviewed above did not represent a "firm and continuing international policy to enclose inland waters within island fringes," *Louisiana Boundary Case*, 394 U.S. at 74 n.97, since they were understood to diverge from the new Convention and also since they were later held not to bind the United States even in Louisiana. Furthermore, it is not entirely plain how the policy developed for Louisiana would have applied on the Arctic coast, and no one examined or expressed an opinion on that question. Thus the events of 1959-1965 did not make the lands part of Alaska's "recognized territory," as that term was used in *California*, 381 U.S. at 168; the *Louisiana Boundary Case*, 394 U.S. at 74 n.97; and the *Alabama and Mississippi Boundary Case*, 470 U.S. at 111.

Alaska suggests, however, that even apart from the supposed ten-mile rule for islands of pre-Convention policy, there are other events and other considerations showing that "the most appropriate method to delimit Alaska's Submerged Lands Act grant is Article 4 straight baselines, subject to a ten-mile limitation." AB 148.

(1) *The Louisiana Boundary Case, 1969-1975*

The 1965 decree in *Louisiana* was entered with the consent of the parties. It was not until 1968 that the United

States moved for a supplemental decree defining the whole Louisiana coastline.¹²⁹ This 1968 motion, together with a cross-motion by Louisiana, led to the decision in the *Louisiana Boundary Case*, 394 U.S. 11 (1969). The Court there reaffirmed that it is for the Federal Government, not the states, to decide whether to draw straight baselines, and then it described a possible exception to this general rule. In describing the exception, the Court spoke of a "firm and continuing international policy to enclose inland waters within island fringes," and then it related the point to Article 4:

It is not contended at this time . . . that the United States has taken that posture in its international relations to such an extent that it could be said to have, in effect, utilized the straight baseline approach sanctioned by Article 4 of the Convention. . . . We do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone.

394 U.S. at 74 n.97 (quoted more fully *supra* page 48).

As Alaska points out, it was also in the *Louisiana Boundary Case* that the United States first said that its concession of Chandeleur and Breton Sounds was at variance with the Convention. Still it did not ask to be relieved of the concession "because we think it would not be in the public interest, at this late date, to upset a fundamental assumption that has guided the conduct of both parties and their lessees in a large

¹²⁹ Motion by the United States for Entry of a Supplemental Decree as to the State of Louisiana (No. 2), Proposed Supplemental Decree, and Memorandum in Support of the Motion of the United States and in Opposition to the Motion of the State of Louisiana (filed Jan. 3, 1968) (Ak. Ex. 85-168), *Louisiana Boundary Case*, 394 U.S. 11 (1969).

area over a long period of time."¹³⁰ Alaska proposes that the continued concession, from 1958 up until 1968, was not contrary to the Convention but in fact reflected a tacit adoption of Article 4 straight baselines.

¹³⁰ The United States said:

Under the Convention . . . waters between the mainland and coastal islands do not have the status of inland waters unless the coastal nation elects to enclose them by straight baselines under Article 4. Prior to that Convention there was no international consensus on the subject; but the United States had taken the position that such waters were inland waters at least in some circumstances. In accordance with that position, we have heretofore treated Chandeleur and Breton Sounds as inland waters in this case and its predecessor, *United States v. Louisiana*, No. 13, Original, October Term, 1948; No. 12, Original, October Terms, 1949-1950; No. 7, Original, October Terms, 1951-1960.

....
We think that there would be much justification for asking at this time to be relieved of a concession, at variance with the Convention on the Territorial Sea and the Contiguous Zone, made four months before that Convention was signed by the United States, more than six years before it entered into force, and seven years before this Court announced that the grant made by the Submerged Lands Act of May 22, 1953, was to be measured by the rules of the Convention rather than by the principles followed by the United States at the time the Act was passed. However, we do not ask for such relief because we think it would not be in the public interest, at this late date, to upset a fundamental assumption that has guided the conduct of both parties and their lessees in a large area over a long period of time. We do point out, however, that since Louisiana's right to these sounds as inland waters rests solely on the basis of our adherence to our past concession, and not on any legal principle, there is no basis on which Louisiana can be allowed closing lines farther seaward than the concession warrants.

Ak. Ex. 85-168, *supra* note 129, at 78-80. In its brief of August 1968, the United States repeated:

[U]nder the rules of the Convention, Breton and Chandeleur Sounds are not inland waters. . . .

... Nevertheless, we do not now claim for the United States the

The truth of this conclusion is partly a matter of terminology. Certainly the United States did not publish charts showing straight baselines in Chandeleur and Breton Sounds, as would be required by Article 4(6) (*supra* page 26).¹³¹

areas previously assumed to be inland waters, because we think it would not be in the public interest to upset, at this date, a postulate that has guided the conduct of both parties and their lessees in a large area over a long period of time. But since the concession related to specific areas and was expressed in geographic terms, we should not be precluded from relying upon the Convention in resisting Louisiana's effort to add adjoining waters, never within the concession, to those we are willing to concede.

Brief for the United States (1968) (Ak. Ex. 85-36, U.S. Ex. 85-901), at 121-24, *United States v. Louisiana*, 394 U.S. 11 (1969).

¹³¹ Charts published in 1971 showed high seas in the sounds. See pages 166-167 *infra*; Ak. Ex. 85-905 (NOS chart 11363).

Also in 1971, the United States and Louisiana entered a stipulation giving the State the right to exploit Chandeleur and Breton Sounds but not deciding whether they were inland waters. Ak. Ex. 85-249, *reprinted in United States v. Louisiana*, Report of Special Master Walter P. Armstrong, Jr., *supra* note 122, at 63-66 (1974). The stipulation stated that it was entered "[f]or the sole purpose of expediting the ultimate resolution of this case, and without deciding whether Chandeleur or Breton Sounds are inland waters . . ." It also stated:

2. In entering this stipulation, Louisiana maintains its position that the whole of Chandeleur Sound and Breton Sound are inland waters, that straight baselines have in effect been drawn from Mississippi around the Delta and that for this and other reasons and other actions taken by both governments these are historic waters. Louisiana recognizes, however, the United States position that these are not wholly inland waters, and agrees that Louisiana does not and will not base its arguments regarding the inland status of these or any other waters in this or any future litigation between it and the United States, upon this stipulation, upon the action of the United States in fixing the Chapman Line in this area, or upon prior concessions regarding this area made by the United States for the purpose of this case and the predecessor case, *United States v. Louisiana*, 339 U.S. 699.

3. In entering this stipulation, the United States maintains that its agreement is not based on the belief that these are historic inland

Furthermore, the Special Master in the *Louisiana Boundary Case* found that the United States had not employed a straight baseline system in Louisiana. Report of Special Master Armstrong, *supra* note 122, at 5-13 (1974).

In some looser sense, of course, the closing of the sounds can be said to have amounted to a use of straight baselines, even if not quite in accordance with Article 4. Since the sounds were originally closed on the advice of the State Department, this must also have for some period been the international position and not just a position taken for purposes of the Submerged Lands Act. But even if the closing of the sounds as inland waters were attributed to Article 4 of the Convention rather than to pre-Convention policy, that still would not help Alaska. The Court said in the *Louisiana Boundary Case*:

In *United States v. California*, 381 U.S. 139, 168, we held that "the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States."⁹⁶

⁹⁶ In the same vein, we held that the choice whether to employ the concept of a "fictitious bay" was that of the Federal Government alone. 381 U.S., at 172. That holding was, of course, consistent with the conclusion that the

waters or described by a system of straight baselines, or on any other basis than is set out at pages 120-126 of the Brief for the United States, on Cross-Motions for the Entry of a Supplemental Decree as to the State of Louisiana (No. 2), in this case in 1968, and at pages 76-79 of the Reply Brief for the United States in the same cause. The United States maintains its position, there stated, that those parts of this area which are beyond normal territorial waters measured from closing lines of juridical bays and the low-water line of the mainland and islands are high seas.

drawing of straight baselines is left to the Federal Government, for a "fictitious bay" is merely the configuration which results from drawing straight baselines from the mainland to a string of islands along the coast. See 381 U.S., at 170, n. 38.

394 U.S. at 72 & n.96. In other words, the use of a pre-Convention concept—here, "fictitious bay"¹³²—might be equated to the use of straight baselines, but the choice of terminology did not make the decision any less optional. Thus, even if the United States were said to have used straight baselines in claiming Chandeleur and Breton Sounds as inland waters, it still would not be committed to using straight baselines wherever it could.

(2) *Alaskan baselines*

Alaska cites several poststatehood events involving possible straight baseline claims in Alaska itself. None is helpful to its present case.

One cluster of items, already disposed of, concerns fishing regulations in Alaska. Some of these regulations were reissued after statehood, and a series of historical studies issued by the State Department in 1963 referred to them or their predecessors as indicating the adoption of straight baselines or at least support for the method of straight baselines. However, the Court's decision in *United States v. Alaska*, 422 U.S. 184 (1975), shows the State Department's characterization to have been mistaken. See *supra* section F(5)(b).

Another group of items concerns the work of Dr. G. Etzel Percy, who was the Geographer of the State Department at the time of Alaska's admission to the Union. In June 1959, Dr. Percy published an article explaining the principles of

¹³² The concept of a fictitious bay comes from the International Law Commission. See *supra* page 154 n.124.

the Convention and stating that he had plotted the territorial sea of the United States "[i]n order to fully explore the cartographic problems of the coast." Percy, *supra* page 136, U.S. Ex. 85-231 at 2. Although his plotting apparently did not yet extend to Alaska,¹³³ Percy did mention its southeast coast, that is, the Alexander Archipelago, as a situation for straight baselines:

The Convention on the Territorial Sea and the Contiguous Zone permits the use of straight baselines along a coast which is "deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity." . . . Just where this type of situation exists is difficult to ascertain objectively, but the coast of Norway constitutes a clear-cut example, as does that of the archipelago along the southeast coast of Alaska.

Along the coasts of the continental United States—again excluding Alaska—no situation appears to exist which could be construed as requiring the use of a straight baseline.

Id. at 9 (footnotes omitted).

Later Percy did prepare charts showing straight baselines in southern Alaska,¹³⁴ and some use was made of them by

¹³³ In a footnote to the article Percy said, "The U.S. Coast and Geodetic Survey charts used in measuring the territorial sea were Atlantic and Gulf coasts, 1200 series; Pacific coast, in the 5000 series. A total of 89 charts were utilized." U.S. Ex. 85-231, *supra* page 136, at 2 n.2. Charts for Alaska would have been in the 8000 and 9000 series. See, e.g., the charts mentioned in notes 134 and 141 *infra*.

¹³⁴ For examples see Ak. Exs. 85-910a (chart 8252, Coronation Island to Lisianski Strait [in the Alexander Archipelago]), 85-910b (chart 8551, Prince William Sound [on the southern coast]), and 85-910c (chart 8502, Cape St. Elias to Shumagin Islands [also on the southern coast and including Cook Inlet]). As was brought out during the hearing, the charts actually show alternative lines, and Ak. Ex. 85-910c carries the following legend:

the Coast Guard and the Bureau of Commercial Fisheries.¹³⁵ But all of this was limited to the southern parts of Alaska, and whatever effect it might have had there, the effect would not extend to the Arctic coast.

In fact it is highly questionable whether Percy would have recommended straight baselines in the Arctic. He opposed the closing of Chandeleur Sound and showed it on his maps as partly high seas. See letter of February 29, 1960, from Solicitor General Rankin to Admiral Karo, quoted *supra* page 136 n.102; memorandum of about February 1961 by Mr. George Swarth, quoted *supra* page 149 n.118; memorandum of May 2, 1961, by Dr. Percy, quoted *supra* page 149. It is unknown whether Percy would have thought

Normal closing green

Baseline (logical) red

Baseline (possible/extreme) purple

See Tr. 2701-07, 2735-36. Some additional examples of the charts, all from the Alexander Archipelago and without alternative versions of Percy's lines, are included in *Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries, Hearing Before the Senate Comm. on Commerce*, 92d Cong., 2d Sess. (1972) (Ak. Ex. 85-23) (pocket supp., nos. 12-14).

¹³⁵ See the following groups of exhibits:

Ak. Ex. 85-46, tab 4, and U.S. Ex. 85-304 (correspondence during 1963-64, primarily among personnel of the Bureau of Commercial Fisheries).

Ak. Exs. 85-196 and -197, U.S. Exs. 85-305 and -306 (correspondence of June 1967 between Percy and the Coast Guard).

Ak. Exs. 85-209, 85-214 (correspondence of 1968-69 regarding the planned printing of the Percy maps with a legend as to their provisional nature).

Later commentary by a State Department representative appears in *Provisional U.S. Charts Delimiting Alaskan Territorial Boundaries*, *supra* note 134, at 2, 17 (statement of Steven C. Nelson, special assistant to the Legal Adviser).

Chandeleur Sound or the Alexander Archipelago to be the better precedent for Stefansson Sound.

The third main episode regarding straight baselines in Alaska occurred in the 1970s. In 1970, several federal agencies agreed to establish an ad hoc Committee on the Delimitation of the United States Coastline, later informally called the Baseline Committee. The committee was organized within the existing Interagency Task Force on the Law of the Sea (chaired by the State Department Legal Adviser, John Stevenson), and it included representatives from the Departments of State, Justice, Interior, Commerce, and Transportation.¹³⁶ The committee was to "review the lines recently drawn by the Geographer of the Department of State [now Robert D. Hodgson] on existing charts" and to "determine the location of the limits of the United States territorial sea and the contiguous zone as accurately as possible in light of the data on those charts."¹³⁷ In particular, the committee was instructed to follow the 1958 Convention without using straight baselines.¹³⁸

The committee finished its delimitation of the coastline, with 155 maps in all, by the spring of 1971,¹³⁹ and the maps

¹³⁶ See U.S. Exs. 85-104 to -111, Ak. Ex. 85-244 (interdepartmental correspondence of March-September 1970).

¹³⁷ Memorandum from Carl F. Salans, Acting Legal Adviser, to members of the LOS Task Force Executive Operations Group (Aug. 7, 1970) (U.S. Ex. 85-106).

¹³⁸ Tr. 3058 (testimony of Jonathan Charney, an original member of the committee); U.S. Ex. 85-112 (apparently the "fuller description of the committee's functions" mentioned by Mr. Salans as attached to his August 7, 1970, memorandum, *supra* note 137).

¹³⁹ See U.S. Ex. 85-114, Ak. Ex. 85-243 (summary report of the committee, undated); Ak. Ex. 85-254 (memorandum dated May 18, 1971, from Deputy Attorney General Richard Kleindienst to all United States Attorneys, advising that although the maps were subject to revision, "for the present, they should be followed as representing the official position of the United States in any case where such questions arise").

were published in April.¹⁴⁰ Because the delimitation did not use straight baselines, the maps showed certain enclaves of high seas, for instance in the Alexander Archipelago.¹⁴¹ Alaskan protests led the State Department to reconsider the maps for the archipelago.¹⁴² Finally, after two years of further discussions, the State Department concluded that it would not oppose application of straight baselines to the Alexander Archipelago provided, among other things, that Alaska would agree not to use them as the basis for a claim to additional submerged lands. Memorandum from Charles N. Brower, Acting Legal Adviser, to the Interagency Task Force on the Law of the Sea (May 7, 1973) (U.S. Ex. 85-324, Ak. Ex. 85-288). The Law of the Sea Task Force, however, decided to send the matter to the Office of Management and Budget. In a letter to Senator Stevens of Alaska, a State Department spokesman explained this action as follows:

Secretary Rogers has asked that I write to inform you of action that we have taken with regard to the maritime boundaries in the Alexander Archipelago area of Alaska.

After a thorough review by the Inter-agency Law of the Sea Task Force, the majority of agencies on the Task Force agreed that the drawing of straight baselines in the area would not result in major adverse consequences in the law of the sea negotiations although there were some differences of opinion on this question. However, some

¹⁴⁰ See Ak. Ex. 85-280, item 3 (memorandum dated Aug. 30, 1972, by John R. Stevenson, dating publication of the maps to April 1971).

¹⁴¹ For the committee's treatment of the north coast of Alaska, see U.S. Ex. 85-116 (minutes of July 27, 1970, covering Coast and Geodetic Survey charts 9451 to 9478); U.S. Ex. 85-115, Ak. Ex. 85-242 (minutes of Aug. 3, 1970, further considering charts 9466 to 9469).

¹⁴² See generally U.S. Exs. 85-307 to -325; Ak. Exs. 85-23, -46, -203, -204, -217, -253, -258 to -261, -263, -266, -273, -274, -276 to -281, -283 to -288, -290, -296.

of the agencies did indicate a strong concern with the possible precedent-setting effect, both legal and political, of such action on other coastal areas of the United States, and on the respective rights of state and federal governments to the resources and revenues from the submerged lands beneath the additional areas of territorial sea and internal waters. Consequently, at the request of the Department of the Interior the matter was referred to the Office of Management and Budget for coordinating final action on the issue.

We have requested the Office of Management and Budget to take whatever action is necessary to reach a final solution to the problem and we will inform you of whatever action is taken.

Letter from Marshall Wright, Assistant Secretary for Congressional Relations, to Senator Ted Stevens (June 21, 1973) (Ak. Ex. 85-290). The record shows no further action.

Once again, the debate over straight baselines in the Alexander Archipelago was not a debate over straight baselines on the Arctic coast.

(3) Motivation

Alaska raises a point about the motivation of the United States: that "its continued refusal to use Article 4 straight baselines, traces directly to its litigation position in these domestic submerged lands cases." AB 170. On the question of motivation Alaska cites the sequence of events in the Alexander Archipelago, above, and also a much earlier letter which it calls "perhaps the most telling piece of evidence." AB 171 n.38.

This earlier letter, dated October 24, 1963, was sent by Attorney General Robert Kennedy to Under Secretary of State U. Alexis Johnson. The letter itself is not in evidence, but it is paraphrased as follows in a partially declassified State Department document:

The Attorney General, Robert F. Kennedy, sheds some light on another aspect of the problem [arising from excessive Canadian straight-baselines claims]: Recognition of Canadian claims to the waters in question could have some indirect effects in the continuing controversy between the United States and its coastal states over ownership of offshore mineral resources. Kennedy pointed out that in that controversy it was to the advantage of the United States to establish the narrowest possible limits for inland and territorial waters. The attorney general's conclusion on behalf of the Department of Justice seemed pertinent to all the responding departments.

Historical Studies Division, U.S. Dep't of State, Research Project No. 1031-B, United States Policy Regarding the Oceans and the Law of the Sea, 1960-1967 (1974), excerpt from page 31 (Ak. Ex. 85-182).

I agree with Alaska that, as these letters indicate, the United States has shown itself concerned over the effect that might follow for federal-state submerged lands litigation if it were to draw straight baselines under Article 4.¹⁴³ I do not agree that the concern invalidates the United States' position. This is not a situation in which the United States has created a contraction of Alaska's recognized territory in the Arctic; it is not a case in which the United States in effect used straight baselines but "abandon[ed] that stance solely to gain advantage in a lawsuit . . ." *Louisiana Boundary Case*, 394 U.S. at 73 n.97; see *supra* pages 47-48. Rather, it is only a case in which the United States has claimed less inland waters than it might have. The situation falls therefore

¹⁴³ In the Alexander Archipelago discussions, the Justice Department took the view that to adopt straight baselines would not add to Alaska's Submerged Lands Act grant but would very probably lead to litigation. Letter from Bruce C. Rashkow to John R. Stevenson (Dec. 1, 1972) at 5-11 (Ak. Ex. 85-276, item 2).

within the general rule of the *Louisiana Boundary Case*, as follows:

In *United States v. California*, 381 U.S. 139, 168, we held that "the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States." Since the United States asserts that it has not drawn and does not want to draw straight baselines along the Louisiana coast, that disclaimer would, under the *California* decision, be conclusive of the matter. *Louisiana argues, however, that because the Louisiana coast is so perfectly suited to the straight baseline method, and because it is clear that the United States would employ it in the conduct of its international affairs were it not for this lawsuit, the Court should reconsider its holding in California and itself draw appropriate baselines.* While we agree that the straight baseline method was designed for precisely such coasts as the Mississippi River Delta area, we adhere to the position that the selection of this optional method of establishing boundaries should be left to the branches of Government responsible for the formulation and implementation of foreign policy. *It would be inappropriate for this Court to review or overturn the considered decision of the United States, albeit partially motivated by a domestic concern, not to extend its borders to the furthest extent consonant with international law.*

394 U.S. at 72-73 (footnotes omitted) (emphasis added).¹⁴⁴

¹⁴⁴ In a related type of case, the Court has recently confirmed that the United States may make decisions affecting federal and state rights in submerged lands on the basis of federal property interests. The Court found it reasonable for the Army Corps of Engineers, in deciding whether proposed construction of port facilities was in the public interest, to consider "whether an artificial addition to the coastline will increase the

(4) *Future foreign policy*

Alaska presented testimony designed to show that, as a matter of foreign policy, the United States ought to adopt straight baselines and probably will do so in the future.¹⁴⁵ The issue before the Master, however, is not what the United States' foreign policy should be or will be. Even if the United States did eventually adopt straight baselines, that would not change Alaska's present rights. Furthermore, the Court has indicated that it would not even change Alaska's rights after the adoption:

California argues . . . that if Congress intended "inland waters" to be judicially defined in accordance with international usage, such definition should possess an ambulatory quality so as to encompass future changes in interna-

State's control over submerged lands to the detriment of the United States' legitimate interests." *United States v. Alaska*, 503 U.S. 569, 585 (1992).

¹⁴⁵ Dr. Norton Ginsburg, Professor of Geography at the University of Chicago, compared the baseline policies of nations and showed that, of those developed nations that would benefit from straight baselines and that do not face special political circumstances arguing against straight baselines, the United States was nearly alone in not shifting to the system. Tr. 3000-3024; Ak. Exs. 85-501 to -502(b). Professor Jonathan Charney of the Vanderbilt School of Law, who had worked on submerged lands cases within the Department of Justice (and testified with its consent, Tr. 3031, Ak. Ex. 85-600), stated that there were no foreign policy reasons against adopting straight baselines and there were benefits favoring it. Tr. 3067-70. He has also published a paper remarking that the United States surely will adopt a system of straight baselines. Jonathan I. Charney, *The Offshore Jurisdiction of the States of the United States and the Provinces of Canada—A Comparison*, 12 Ocean Dev. & Int'l L. 301, 311 (1983), also in *The Law of the Sea and Ocean Industry: New Opportunities and Restraints* 426, 432 (Douglas M. Johnston & Norman G. Letalik eds., 1984). See Tr. 3037-38. It is not clear whether Professor Charney would hold to his prediction now that the United States has adopted a twelve-mile territorial sea. See *supra* section II, note 3; Tr. 3103-05.

tional law or practice. Thus, if 10 years from now the definitions of the Convention were amended, California would say that the extent of the Submerged Lands Act grant would automatically shift, at least if the effect of such amendment were to enlarge the extent of submerged lands available to the States. We reject this open-ended view of the Act for several reasons. Before today's decision no one could say with assurance where lay the line of inland waters as contemplated by the Act; hence there could have been no tenable reliance on any particular line. After today that situation will have changed. Expectations will be established and reliance placed on the line we define. Allowing future shifts of international understanding respecting inland waters to alter the extent of the Submerged Lands Act grant would substantially undercut the definiteness of expectation which should attend it. Moreover, such a view might unduly inhibit the United States in the conduct of its foreign relations by making its ownership of submerged lands *vis-à-vis* the States continually dependent upon the position it takes with foreign nations.

United States v. California, 381 U.S. 139, 166-67 (1965).

Alaska does not contest this interpretation of the effect of a future adoption of straight baselines. See Tr. 3529-30. The testimony referred to therefore shows only that Alaska's inland-water claims, "if considered as applications of the system of straight baselines permitted by Article 4 of the Convention," are not extravagant. AB 113.

7. Fairness

The central finding of this part of the report is that Stefansson Sound and other areas inside barrier islands had not become established as inland waters by Alaska's statehood. The rules defining inland waters were unclear; they very probably would not have covered Stefansson Sound; and no

actual claim to inland waters in the disputed areas had been made. Neither did the disputed areas become inland waters after Alaska's statehood.

Alaska says that fairness requires an outcome in its favor: that Stefansson Sound, Mississippi Sound, and Chandeleur and Breton Sounds are all geographically similar and so should all be treated alike. In my opinion, a broader view shows this argument to be mistaken. Several other areas are also geographically similar, in Alaska's own sense of satisfying a ten-mile rule for islands, but they have been held not to be inland waters. Such areas exist in Florida, landward of the Florida keys; in Massachusetts, at Nantucket Sound; and in Louisiana, at Caillou Bay. See *supra* page 61 n.21 (Florida); page 58 n.18 (Nantucket Sound); and page 151 & n.122 (Caillou Bay). In terms of the normal baseline and historic bay provisions of the 1958 Convention, it is only the case of Chandeleur and Breton Sounds that is anomalous.

In terms of the technical grounds for defining inland waters that existed before the Convention, Alaska's position is again hard to justify in terms of fairness. Most states joined the Union before there existed any well-defined technical concept of inland waters. The last coastal state to be admitted, before Alaska and Hawaii, was the State of Washington in 1889. See 2 Shalowitz, *supra* page 88, at 428 (1964). Of the American precedents referred to in this report, the only pre-1889 items on near-shore islands are the *Mahler* case, concerning Long Island Sound, and the letter by Secretary of State Seward mentioning the Florida keys. See *supra* sections F(2)(b)-(c). Thus, it is doubtful that any of the older states would be able to make an inland-waters-at-statehood argument with respect to waters the United States does not now claim as inland.¹⁴⁶

¹⁴⁶ Compare *United States v. Maine*, 475 U.S. 89 (1986), in which the Court considered Massachusetts' claim to have acquired title to Nantucket Sound on a theory of "ancient title," described in part as "a clear

At the same time, subsequent developments in the concept of inland waters, up to the Convention, did not create new rights in the older states. The example here is Caillou Bay, which was enclosed as inland waters by the Chapman line but disclaimed as inland waters after the Convention. If Stefansson Sound ever did qualify as inland waters, it would have been on the same theory, whatever that was, as the theory behind the Chapman line. The distinction between Stefansson Sound and Caillou Bay, under Alaska's inland-waters-at-statehood argument, was only that Alaska became a state during the period when the theory of the Chapman line was current. The event of statehood does have significance under the equal-footing doctrine of the *Pollard* case. See generally section VIII(D), *infra*. To apply the doctrine here, however, would seem to put Alaska on a better than equal footing with the older states.

G. Conclusion

I recommend that questions 2, 3, 4, 12 and 13 be answered in favor of the United States. That is (in terms of the original language of the questions):

Question 2. The extent of Alaska's submerged lands in the leased areas should not be determined on the basis of straight baselines.

Question 12. Similarly, the extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the leased area, should not be determined on the basis of straight baselines.

Question 3. The submerged lands between the mainland and the barrier islands in the leased area (including areas

original title which is fortified by long usage." 475 U.S. at 95-96. The Court found the proof insufficient and therefore declined to decide whether the theory was valid. *Id.* at 105.

more than three miles from any upland) do not belong to Alaska on the ground that they underlie inland waters.

Question 13. Similarly, the extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the leased area, should not be determined on the basis that the waters between the mainland and the barrier islands are inland waters.

Question 4. The submerged lands between the mainland and the barrier islands in the leased area which are more than three miles from any upland, but are totally surrounded by submerged lands owned by Alaska, do not belong to Alaska on the ground that they lie within Alaska's most seaward contiguous boundary.

IV SOUTHERN HARRISON BAY

Alaska's rights to submerged lands depend in part on what waters along the Arctic coast are inland waters. Section III asked whether coastal islands have the effect of creating inland waters. This section asks whether certain waters are inland because they form a juridical bay.

Only one area is at issue, namely southern Harrison Bay:

Question 15: Is the southern portion of the area shown as "Harrison Bay" on NOS chart 16064 a juridical bay, and if so, what is the location of the line enclosing the inland waters of the bay, from which the 3-mile grant to Alaska is to be measured?

Question 15 was heard and briefed along with the questions of section III.¹

The parties agree that question 15 is to be analyzed within the general framework described in section II. Under the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988), Alaska is entitled to the lands beneath navigable waters within its boundaries (§ 1311(a)), including lands out to a line three miles seaward from its coastline (§ 1301(a)(2)). The coastline is defined, in part, as "the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c). Thus, Alaska is entitled to the lands under whatever part of Harrison Bay is inland waters, and three miles beyond.

Furthermore, the parties agree that the extent of inland waters at Harrison Bay depends on Article 7 of the Convention on the Territorial Sea and the Contiguous Zone, *done* Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205. This position reflects the Court's holding, also described in section II, that the meaning of "inland waters" in the Submerged

¹ For the full titles of the briefs, here abbreviated as AB, USB, ARB, and USRB, see *supra* section III, note 3.

Lands Act should conform to the 1958 Convention. *United States v. California*, 381 U.S. 139, 161 (1965).

A. The geography

Harrison Bay lies west of the leased area, adjacent to the National Petroleum Reserve-Alaska.² The bay is shown in figure 4.1.³

As the figure indicates, Harrison Bay is divided into two parts by Atigaru Point. The northwest part, between Atigaru Point and Cape Halkett, is agreed by both parties to form a juridical bay and is not here in dispute.

The disputed area is to the southeast, landward of a line between Atigaru Point and a point off the Nechelik Channel. This area is itself bifurcated, with relatively deep indentations at both ends and a much less indented middle part. Alaska says the entire area should be closed as a bay. The United States says that only the two indentations qualify as bays. These positions are shown schematically in figure 4.2.⁴

The second part of question 15 asks, if a single closing line is to be drawn across southern Harrison Bay, what the location of that line should be. The parties agreed on its

² I find later in this report that Harrison Bay is outside the boundary of the National Petroleum Reserve-Alaska. This finding accords with the positions of both parties. See *infra* section VIII, discussing question 7.

³ Figure 4.1 is an excerpt from NOS chart 16004, which shows the Harrison Bay area on a scale of 1:700,000. Chart 16064, referred to in question 15 and using a scale of about 1:50,000, is too large for convenient reproduction here.

⁴ The closing lines the United States has adopted are also shown on United States Exhibit 85-101, which is a copy of NOS chart 16064. Only for the eastern indentation is the closing line printed on the chart. For the western indentation, the chart does not show the closing line because the line does not change the outer limit of the adjacent three-mile belt. Tr. 3162, U.S. Ex. 85-124.

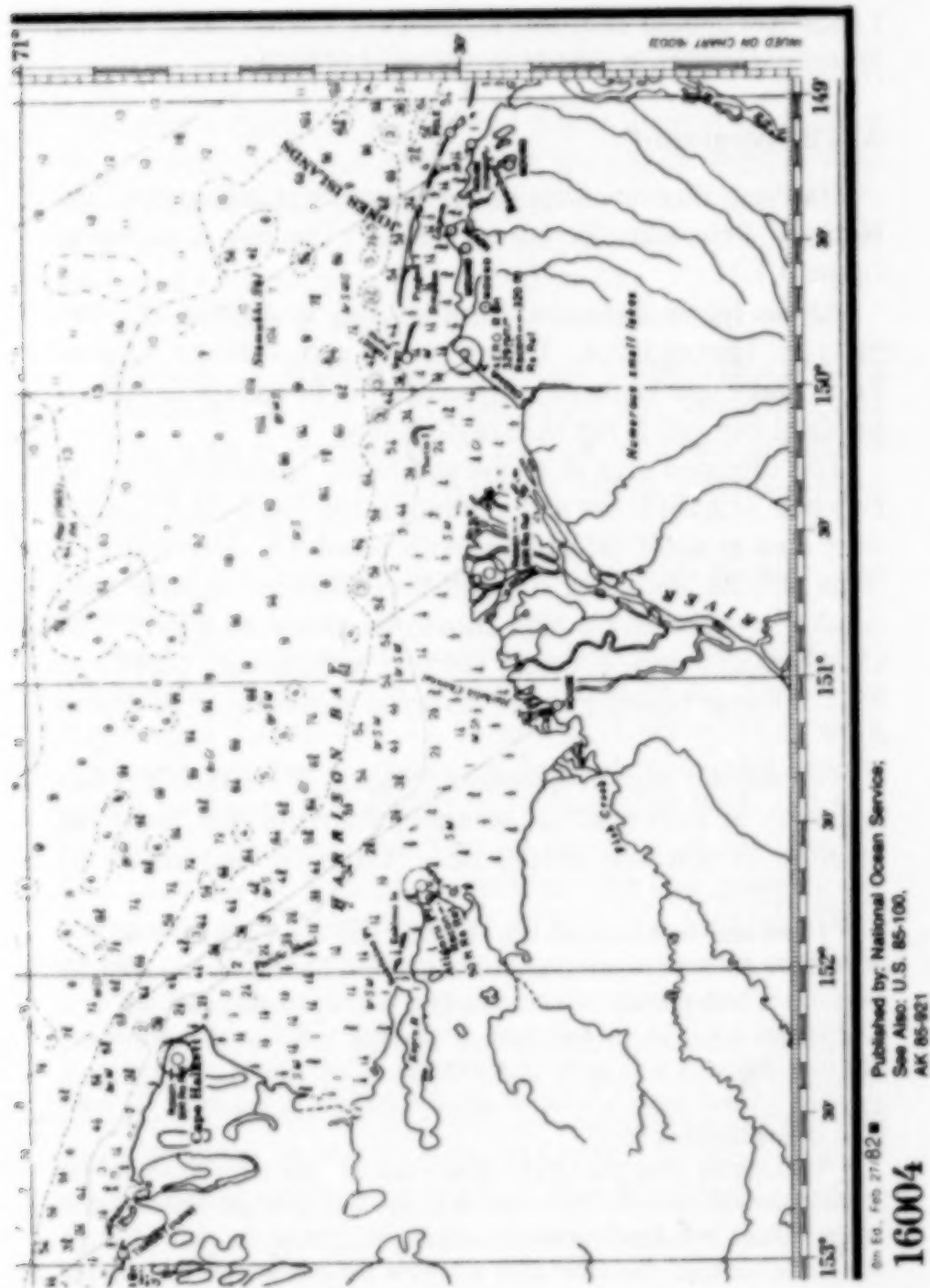


Figure 4.1. Harrison Bay.

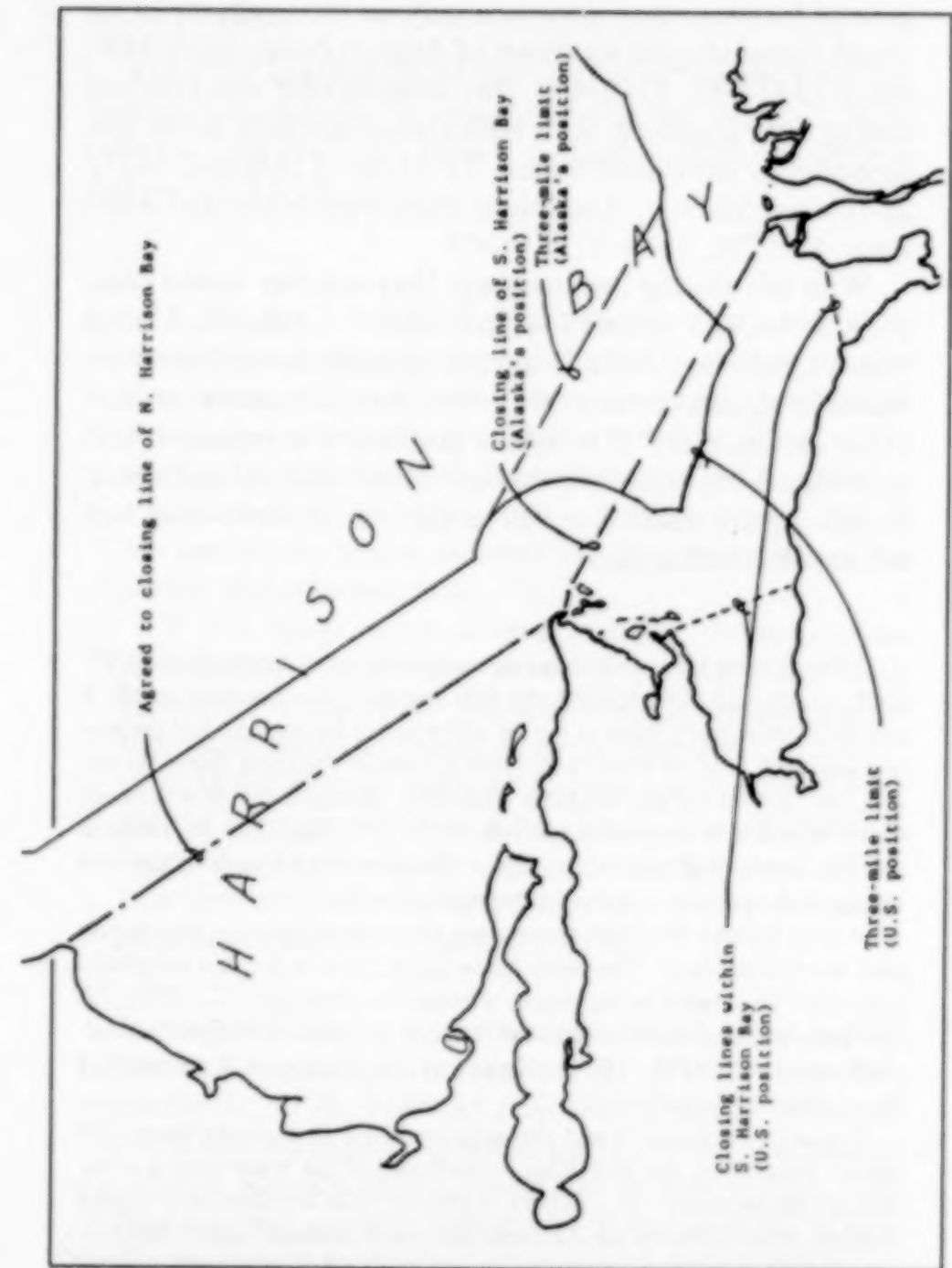


Figure 4.2. The parties' positions on closing lines for Harrison Bay.

general location; they disagreed only on the treatment of an island formation just southeast of Atigaru Point. USB 107-09; Tr. 3177-81, 3240-45. This disagreement was resolved during final argument, with both parties agreeing to the line proposed by the United States. Tr. 3614-16 (Alaska), 3627-28 (United States).⁵ The line is about twelve nautical miles long. Tr. 2798, 2849, 3178.

With this closing line, southern Harrison Bay would comprise about 72.9 square nautical miles.⁶ Under the United States' position, Alaska is already entitled, according to the Master's measurements, to all but about six square nautical miles of this area. If Alaska's position is accepted, it will gain those six square miles as inland waters and about twenty square nautical miles as part of the three-mile belt beyond the closing line.

⁵ The closing line would have two segments. On Alaska Exhibit 85-920K (a copy of chart 16064), the first segment runs between points A and M (from Atigaru Point to the tip of the island formation), and the second segment, from an island near point K (part of the same island formation) to point H (at the Nechelik Channel). Because the area between points M and K is exposed at low tide, Tr. 2781, 2784, 2795-96, no closing line across that area is required. The combined length of the two closing line segments is about twelve nautical miles.

Alaska Exhibit 85-920K shows two earlier proposals for the closing line, marked in black. The more landward of these is the line originally suggested by Alaska to its expert witness, Dr. Prescott. Tr. 2771-72. The more seaward approximates the line that Dr. Prescott himself considered proper. Tr. 2774. The line agreed to is a refinement of the seaward line marked on the exhibit.

⁶ Alaska's witness found the area enclosed to measure about 250 square kilometers, not including a small part of the water area that extended off the chart. Tr. 2787-91, 2798-99. The conversion to square nautical miles is based on the facts that one kilometer equals approximately 0.6214 mile and one mile equals approximately 0.8690 nautical miles. *CRC Standard Mathematical Tables* 3-4 (William H. Beyer ed., 28th ed. 1987).

B. The issues

The 1958 Convention on the Territorial Sea and the Contiguous Zone defines the concept of a bay in Article 7. Most relevant here are paragraphs 2 through 4, with the dispute focused on Article 7(2):

Article 7

....

2. For the purpose of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. . . .

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

....

It is agreed that the semicircle test, stated in the second sentence of Article 7(2), is satisfied. Tr. 2795-99 (Alaska's witness); Tr. 3176, 3184-85 (the United States' witness). There is also agreement, as noted earlier, on the line joining the natural entrance points, mentioned in Article 7(3). The closing line that would join them, some twelve miles, is well within the twenty-four-mile limitation of Article 7(4).

The issues concern the first sentence of Article 7(2), which defines a bay in terms such as "well-marked indenta-

tion" and "landlocked waters." First, what is its relationship to the second sentence of the paragraph? The United States contends that the test of the first sentence is independent from that of the second. Alaska contends that the second sentence of Article 7(2), the semicircle test, was added to provide an objective measure for whether the more subjective requirements of the first sentence are met. On Alaska's reading, the first sentence becomes superfluous.

Second, if the tests are independent, does southern Harrison Bay satisfy the first sentence of Article 7(2)? Alaska says that it does; the United States, that it does not.

Alaska will prevail on question 15 if either of these issues is decided in its favor. Otherwise, question 15 should be decided in favor of the United States.

C. The relation between the two sentences of Article 7(2)

It is clear that Article 7(2) is poorly drafted. Professor O'Connell states:

In view of the drafting history, there is little to indicate the relationship between the two sentences of Article 7(2). Do they contain independent standards, each of which must be satisfied? Or is the second sentence a specification of the standard in the first? . . .

....

The draftsmanship of this paragraph of Article 7 does little credit to the International Law Commission . . .

1 Daniel P. O'Connell, *The International Law of the Sea* 393-94 (I.A. Shearer ed. 1982). Similarly, Professor Westerman writes:

In its totality, Article 7, paragraph two represents a somewhat uneasy marriage between the general configuration requirements of sentence one and the highly specific mathematical requirements of sentence two. . . .

....

Do the well-marked and landlocked requirements have independent validity under paragraph two? Is there any reason to retain somewhat imprecise geographical norms in the face of a geometric formula? These questions do not admit of easy answer.

Gayl S. Westerman, *The Juridical Bay* 93, 96 (1987).

1. The Court's interpretation

Alaska is not the first state to argue that the second sentence of Article 7(2) is only a specification of the first. In *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11 (1969), the Court rejected a similar contention. The Court was dealing with East Bay, a V-shaped indentation in which the semicircle test was not satisfied by a closing line drawn at the seawardmost headlands. Louisiana argued for the use of an internal line that did satisfy the semicircle test. In holding against Louisiana, the Court said:

The United States argues that the area within East Bay enclosed by Louisiana's proposed line does not constitute a bay because there is no "well-marked indentation" with identifiable headlands which encloses "landlocked" waters. Indeed, it is said, there is not the slightest curvature of the coast at either asserted entrance point. We do not now decide whether the designated portion of East Bay meets these criteria, but hold only that they must be met. We cannot accept Louisiana's argument that an indentation which satisfies the semicircle test *ipso facto* qualifies as a bay under the Convention. Such a construction would fly in the face of Article 7(2), which plainly treats the semicircle test as a minimum requirement. And we have found nothing in the history of the Convention which would support so awkward a construction.

394 U.S. at 54.

A related issue in the *Louisiana Boundary Case* concerned the status of Ascension Bay. Finding that Ascension Bay met the semicircle test, 394 U.S. at 53, the Court noted:

The United States argues—in addition to its contention that it does not meet the semicircle test—that “Ascension Bay” is not a true bay because it is a “mere curvature of the coast” rather than a “well-marked indentation” containing “landlocked waters.” If this contention is accepted, then it is of course irrelevant that “Ascension Bay” meets the semicircle test. See *infra*, at 54. Whether an indentation qualifies as a bay under the criteria of Article 7 other than the semicircle test is a factual question which should be submitted to the Special Master in the first instance.

394 U.S. at 48 n.64.⁷

The Court stated the same point more recently in *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504 (1985):

[W]e repeat the Convention’s criteria for determining whether a bay exists: There must be a “well-marked indentation” into the coast and it must “constitute more than a mere curvature of the coast.” The indentation must enclose an area “as large as, or larger than, that of the semicircle whose diameter is a line drawn across the mouth of the indentation.” The indentation must “contain land-

⁷ The Special Master later found that the additional criteria were met, both for an area within East Bay and for Ascension Bay. *United States v. Louisiana*, Report of Special Master Walter P. Armstrong, Jr., at 26–35, 45–48 (1974) (U.S. Ex. 85-415), reprinted in *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases, 1949–1987* (Michael W. Reed, G. Thomas Koester, & John Briscoe eds., 1991), at 181, and in 59 I.L.R. 249. The Master’s report was accepted by the Court. *United States v. Louisiana (Louisiana Boundary Case)*, 420 U.S. 529 (1975).

locked waters.” And the mouth of the bay must not exceed 24 miles.

469 U.S. at 514; see also *id.* at 520–21. The Court went on to choose between possible closing lines for Long Island Sound, either of which would have met the semicircle test, on the basis of whether or not the enclosed waters were landlocked. *Id.* at 526.

Alaska concedes that it is facing a matter of stare decisis, Tr. 3604, but it urges that the Court’s interpretation of Article 7(2) was mistaken.⁸ In neither the *Louisiana Boundary Case* nor the *Rhode Island and New York Boundary Case*, Alaska says, did the parties bring the history of Article 7 to the attention of the Court. ARB 59–62, Tr. 3601–04; see also AB 182 n.139. The United States replies that the history is consistent with the Court’s construction of the article. USB 94 n.47, USRB 23.⁹

⁸ Alaska also seeks to distinguish the *Rhode Island and New York Boundary Case* in that the Court there had already found that a bay existed; the question then became the location of its natural entrance points. As the United States observes, however, this argument does not serve to distinguish away the Court’s treatment of East Bay and Ascension Bay in the *Louisiana Boundary Case*.

⁹ The United States also gives examples of formations that would satisfy the semicircle test but fail the subjective standards of the first sentence of Article 7(2). One is Long Island and Block Island Sounds, if closed by the line the Court rejected in the *Rhode Island and New York Boundary Case*. Another, offered as a reductio ad absurdum, is San Francisco Bay, if it were closed by a line outside the Golden Gate running from Duxbury Point, at Bolinas, in the north to Point San Pedro, near Pacifica, in the south. USB 95–96; Tr. 2854–56, 3187–89, 3190–94, 3216–17; U.S. Ex. 85-126. Alaska has suggested various ways of explaining this apparent counterexample to the sufficiency of the semicircle test. ARB 69–70; Tr. 3632–36. In view of my conclusions about the history of Article 7(2), I find it unnecessary to rule on the merits of these arguments.

Most of the historical material is readily available¹⁰ and could have been judicially noticed in the previous cases. I have reviewed it nevertheless. I find that, even if it be appropriate to reopen the question of interpreting Article 7(2), the history tells in favor of the Court's previous interpretation.¹¹

2. The history of Article 7(2)

a. Early proposals

Alaska's material does suggest that the early proponents of the semicircle test meant it to be a sufficient condition for waters to qualify as a bay. The test was devised in 1930 by R.S. Patton, the Director of the Coast and Geodetic Survey. Patton wrote:

The term "bay", as actually applied in common usage, is so indefinite as not to be susceptible of *precise definition which is at once inclusive and exclusive*. . . .

¹⁰ *League of Nations Conference for the Codification of International Law [1930]* (ed. Shabtai Rosenne 1975) (4 vols.); the Yearbooks of the International Law Commission for 1951-1956, U.N. Docs. A/CN.4/SER.A/1951 & 1951/Add.1 through A/CN.4/SER.A/1956 & 1956/Add.1; and U.N. Conference on the Law of the Sea, Official Records, U.N. Docs. A/CONF.13/37-39 (1958) (3 vols.).

¹¹ The negotiating history of Article 7(2) is thus used to confirm an interpretation based on ordinary meaning. Such a use of supplementary means of interpretation is approved in the initial language of article 32 of the Vienna Convention on the Law of Treaties, *done* May 22, 1969, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980). The Vienna Convention has not been ratified by the United States but is regarded as codifying customary international law. Restatement (Third) of the Foreign Relations Law of the United States, part III, introductory note (1986).

As will appear in section D, the history of Article 7(2) also provides background for interpreting the relatively vague requirements of its first sentence.

....
In theory, the question whether a bay is intra- or extra-territorial would seem to depend upon the extent to which the waters penetrated into the land, or, more precisely, to the ratio of that penetration to the dimension of the entrance.

Can that ratio be expressed satisfactorily in mathematical terms?

R.S. Patton, *The Three-Mile Limit* [1930] (Ak. Ex. 85-56, U.S. Ex. 85-200) (emphasis added). Patton then answered his own question by proposing a semicircle test.

Patton's memorandum was written in preparation for the League of Nations Conference for the Codification of International Law, held at The Hague in 1930. The memorandum was sent to the United States delegation at The Hague, and the delegation included a semicircle test in its proposals to the conference. See generally Aaron L. Shalowitz, *The Concept of a Bay as Inland Waters*, 13 *Surveying and Mapping* 432, 433-34 (1953) (Ak. Ex. 85-43, Ak. Ex. 85-336); 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* 34 nn.7-8 (U.S. Dep't of Commerce Pub. 10-1, 1962). The United States' proposal on bays evidently would have made the semicircle test sufficient, for it said in part:

[T]he determination of the status of the waters of a bay or estuary, as interior waters or high sea, shall be made in the following manner:

....
... If the area enclosed . . . exceeds the area of a semicircle . . . , the waters of the bay or estuary inside of the straight line shall be regarded, for the purposes of this Convention, as interior waters; otherwise they shall not be so regarded.¹²

¹² 3 *Acts of the Conference for the Codification of International Law* 198, League of Nations Doc. C.351(b).M.145(b).1930.V (1930) (Ak. Ex.

The subcommittee to which the proposal was referred took no action on it, however; its recommendation on bays provided a ten-mile maximum closing line but left "bay" undefined.¹³

b. *The International Law Commission*

The 1930 Hague Conference closed without adopting a convention. The drafting of an article on bays was next taken up by the International Law Commission.¹⁴ In 1951, at its third yearly session, the Commission decided to initiate work on the topic "régime of territorial waters" and appointed, as special rapporteur, Mr. J.P.A. François of the Netherlands.¹⁵ François prepared draft articles, including an

85-1), reprinted in 4 Rosenne, *supra* note 10, at 1203, 1400. See also S. Whittemore Boggs, *Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law*, 24 Am. J. Int'l L. 541, 550 (1930) (Ak. Ex. 85-61, U.S. Ex. 85-223).

The details of the proposal, omitted above, were different from the semicircle test eventually included in Article 7(2). For discussion of the 1930 version, see 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* 36-40 (U.S. Dep't of Commerce Pub. 10-1, 1962).

¹³ 3 *Acts of the Conference for the Codification of International Law*, *supra* note 12, at 217-20. The subcommittee observed, "Most delegations agreed to a width of ten miles provided a system were simultaneously adopted under which slight indentations would not be treated as bays." The United States proposal was appended to the report as one possible such system, as was a French proposal, but the subcommittee noted that it was expressing no opinion on them. The parent committee took no action on the subcommittee's draft but called it "valuable material for the continuation of the study of the question." *Id.* at 209, 211.

¹⁴ For the establishment of the International Law Commission, see *supra* section III, note 89.

¹⁵ *Report of the International Law Commission to the General Assembly*, 6 U.N. GAOR Supp. (No. 9) at 17, U.N. Doc. A/1858 (1951), reprinted in [1951] 2 Y.B. Int'l L. Comm'n, *supra* note 10, at 123, 140.

article on bays, which went through five versions from 1952 through 1955.

In his first two drafts,¹⁶ François simply repeated the recommendation of the subcommittee at the Hague Conference. In commentary, he recommended obtaining the assistance of experts. A committee of such experts met at The Hague on April 14-16, 1953; S. Whittemore Boggs of the State Department was the American member. The experts proposed, in relevant part:

A bay is a bay in the juridical sense, if its area is as large as, or larger than that of the semi-circle drawn on the entrance of that bay. Historical bays are excepted; they should be indicated as such on maps.¹⁷

François accepted this concept in his later drafts.¹⁸ The ver-

¹⁶ J.P.A. François, *Report on the Régime of the Territorial Sea*, U.N. Doc. A/CN.4/53 (1952) (in French), [1952] 2 Y.B. Int'l L. Comm'n, *supra* note 10, at 25; J.P.A. François, *Second Report on the Régime of the Territorial Sea*, U.N. Doc. A/CN.4/61 (Feb. 19, 1953) (in French), [1953] 2 Y.B. Int'l L. Comm'n, *supra* note 10, at 57.

¹⁷ *Report of the Committee of Experts on Technical Questions Concerning the Territorial Sea*, Annex to François (1953), *infra* note 18. The question to which this proposal responded was as follows: "Accepting the low-water line system as the general rule for measuring the territorial sea, while in bays a straight line across the bay should circumscribe the 'inland waters', what technical observations can be made as to . . . the definition of a bay as opposed to a mere curvature in the coastline?" *Id.*

¹⁸ François's revision of May 1953 used language nearly identical to the experts' proposal. J.P.A. François, *Addendum to the Second Report on the Régime of the Territorial Sea*, U.N. Doc. A/CN.4/61/Add.1 (May 18, 1953) (in French), [1953] 2 Y.B. Int'l L. Comm'n, *supra* note 10, at 75, 76-77; also U.S. Ex. 85-228 (in English).

A further revision, dated February 1954, changed the language but continued to use only the semicircle test for a bay:

1. The waters of a bay will be considered internal waters if the line drawn across the opening does not exceed 10 miles.

2. One understands by "bay" in the sense of the first paragraph, an

sion that was brought before the Commission for action, in June 1955, read as follows:

1. The waters of a bay will be considered internal waters if the line drawn across the opening does not exceed 10 miles from the low-water mark.

2. One understands by "bay" in the sense of the first paragraph, an indentation whose area is equal to or greater than the area of the semi-circle having as diameter the line drawn between the points limiting the entrance of the indentation. . . .¹⁹

Up to this point, in summary, views that the semicircle test should be a sufficient condition for waters to qualify as a bay had been expressed or at least implied a number of times: by Admiral Patton in 1930, by the American delegation to the 1930 Hague Conference, by the committee of experts that advised the International Law Commission in 1953, and by the special rapporteur in his draft articles of 1953 through 1955. Had the rapporteur's draft been adopted by the International Law Commission and carried forward into the 1958 Geneva Convention, it seems clear enough that it would give the result for which Alaska now contends. But this history refers to earlier drafts rather than the final one.

indentation whose area is equal to or greater than the area of the semi-circle having as diameter the line drawn between the points limiting the entrance of the indentation. . . .

J.P.A. François, *Third Report on the Régime of the Territorial Sea*, U.N. Doc. A/CN.4/77 (Feb. 4, 1954) (in French; Master's translation), [1954] 2 Y.B. Int'l L. Comm'n, *supra* note 10, at 1, 4-5. For François's final revision, of May 1955, see the text and note 19 *infra*.

¹⁹ J.P.A. François, *Amendments Proposed on the Basis of the Observations of Governments on the Draft of Provisional Articles Adopted by the Commission at Its Sixth Session*, U.N. Doc. A/CN.4/93 (May 16, 1955) (in French; Master's translation), [1955] 2 Y.B. Int'l L. Comm'n, *supra* note 10, at 5. Paragraph 2 is unchanged from the previous draft, quoted *supra* note 18.

The critical fact is that François's definition of "bay" was not adopted. François presented his proposal on June 22, 1955.²⁰ An alternate proposal was promptly offered by Mr. García Amador of Cuba; among other things it removed the limit on the length of a closing line and defined "bay" as in the first sentence of present Article 7(2):

1. For the purpose of these regulations, a bay is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast.²¹

In the debate that followed, García Amador explained that the definition in paragraph 1 was based on the conclusions the United Kingdom had presented in the *Anglo-Norwegian Fisheries Case*, 1951 I.C.J. 116, 122, para. 6, with the addition of a reference to landlocked waters based on the dissenting opinion of Judge McNair, *id.* at 163.²²

Other speakers criticized García Amador's definition as extremely vague and perhaps begging the question.²³ Sir

²⁰ *Summary Records of the 317th Meeting*, [1955] 1 Y.B. Int'l L. Comm'n, *supra* note 10, at 201, 205.

²¹ *Id.* at 206. García Amador's proposal contained several additional paragraphs, including a semicircle test in paragraph 3:

3. The waters within a bay shall be considered inland waters:

(a) If the area of the indentation is as large or larger than that of the semicircle drawn on the entrance of that indentation.

(b) If the bay is totally bordered by the territory of a single State.

Id. However, Commission members viewed only his paragraph 1 as relating to the definition of a bay (as opposed to the conditions for closing a bay). *Summary Records of the 318th Meeting*, June 23, 1955, [1955] 1 Y.B. Int'l L. Comm'n, *supra* note 10, at 207, 210, paras. 36-39. García Amador's paragraph 1 was acted on separately, *id.* at 211, and the Commission never returned to his paragraph 3.

²² *Summary Records of the 317th Meeting*, *supra* note 20, at 206-07.

²³ *Summary Records of the 318th Meeting*, *supra* note 21, at 207, 209.

Gerald Fitzmaurice of the United Kingdom characterized paragraph 1 as containing a good general description possibly helpful to a layman, but not a precise definition of the kind proposed by the special rapporteur. He therefore proposed that it be amplified by adding the following sentence at the end:

An indentation shall not, however, be regarded as a bay unless its area is as large or larger than that of the semicircle drawn on the entrance of that indentation.²⁴

García Amador accepted this amendment, and, with the amendment, the Commission adopted his paragraph 1.²⁵ It became part of the article as finally adopted by the Commission²⁶ and was submitted, with other articles adopted at the 1955 session, to governments for comment.²⁷

The 1955 action of the International Law Commission put the definition of "bay" into the following form (which is essentially the same as present Article 7(2)):

Article 7

Bays

1. For the purpose of these regulations, a bay is a well-marked indentation whose penetration inland is in such proportion to the width of its mouth as to contain land-locked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as or larger than that of the semi-circle drawn on the entrance of that indentation.

²⁴ *Id.* at 210.

²⁵ *Id.* at 210-11.

²⁶ *Summary Records of the 324th Meeting*, July 1, 1955, [1955] 1 Y.B. Int'l L. Comm'n, *supra* note 10, at 247, 251.

²⁷ *Report of the International Law Commission to the General Assembly*, 10 U.N. GAOR Supp. (No. 9) at 15, U.N. Doc. A/2934 (1955), reprinted in [1955] 2 Y.B. Int'l L. Comm'n, *supra* note 10, at 19, 34.

Thus, the Commission rejected a proposal that, on its face, would have made the semicircle test sufficient for bayhood. Instead it adopted a provision that, on its face, made the semicircle test only a necessary condition supplementing other more subjective criteria. The question remains whether there is anything in the subsequent history that calls for reading the language adopted as nevertheless making the semicircle test sufficient. I find that there is not.

In the rapporteur's commentary accompanying the 1955 article, it is true, the amendment was ignored and a sentence was included that appeared to make a mathematical test sufficient for bayhood:

Comment

The first paragraph, which is borrowed from the report of the Committee of Experts reproduced as an addendum to the second report by the special rapporteur on the régime of the territorial sea (A/CN.4/61/Add.1), lays down the conditions that must be satisfied by an indentation or curve, if it is to be regarded as a bay. In adopting this provision, the Commission repaired the omission to which attention had already been drawn by The Hague Codification Conference of 1930. An indentation will be regarded as a bay provided it conforms to the criterion adopted by the Commission, namely, that the distance between the two extremities shall be twice the depth of the indentation, i.e., twice the distance between the closing line and the head of the bay.²⁸

But at the 1956 session of the International Law Commission, the article on bays was considered again in the light of

²⁸ *Id.* at 18, [1955] 2 Y.B. Int'l L. Comm'n at 36-37. François regarded the last sentence as equivalent to the semicircle test. *Summary Records of the 317th Meeting*, *supra* note 20, at 206, para. 50.

the comments by governments.²⁹ The definition of a bay was left intact,³⁰ and the commentary, as revised, omitted the sentence that specified sufficient mathematical conditions:

(1) Paragraph 1, which is taken from the report of the committee of experts mentioned above, lays down the conditions that must be satisfied by an indentation or curve in order to be regarded as a bay. In adopting this provision, the Commission repaired the omission to which attention had already been drawn by The Hague Codification Conference of 1930 and which the International Court of Justice again pointed out in its judgement in the Fisheries Case. Such an explanation was necessary in order to prevent the system of straight baselines from being applied to coasts whose configuration does not justify it, on the pretext of applying rules for bays.³¹

At the 1956 session the International Law Commission

²⁹ *Summary Records of the 365th and 366th Meetings*, [1956] 1 Y.B. Int'l L. Comm'n, *supra* note 10, at 187, 190-93, 195-97.

³⁰ The Commission rejected an amendment, proposed by Mr. Sandström of Sweden, that would have omitted the definition of a bay and provided instead:

1. The waters of a bay shall be considered as internal waters if:
 - (a) By reason of the depth of penetration of the bay, or by its configuration generally, its waters are closely linked to the land domain;
 - (b) The line drawn between the points marking the entrance of the bay at low water does not exceed x miles;
 - (c) The area of the bay is as large as or larger than that of the semi-circle drawn on this line, and
 - (d) The coasts belong to a single State.

Id. at 195. During the discussion of the amendment, François did remark that "[i]t was difficult to imagine that any indentation to which the last three criteria applied could nevertheless not be a bay." *Id.* at 196.

³¹ *Report of the International Law Commission to the General Assembly*, 11 GAOR Supp. (No. 9) at 15, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n, *supra* note 10, at 253, 268-69.

produced its final report on the law of the sea, and it recommended the calling of an international conference to prepare one or more conventions.³² This recommendation led to the 1958 Geneva Conference on the Law of the Sea, whose work began from the 1956 draft articles.

c. *The 1958 Geneva conference*

At the 1958 conference, the United States proposed an amendment to the definition of "bay" that would have omitted most of the requirements of the first sentence, making it close to François's 1955 proposal (quoted *supra* page 190):

For the purpose of these articles, a bay is a well-marked coastal indentation with an area at least equal to that of a semi-circle whose diameter is a line drawn across the mouth of the indentation; this line is the closing line of the bay and constitutes the baseline. . . .³³

The attached comments explained:

The words "contain land-locked waters and constitute more than a mere curvature of the coast" in the first sentence of the draft article lack legal precision and are unnecessary in view of the requirement relating to the area of a semi-circle.³⁴

The United Kingdom also proposed an amendment, which made only drafting changes in the definition of "bay" but which inserted a new paragraph stating that Article 7 applies only to bays whose coasts belong to a single state.³⁵

³² *Id.* at 3-4, [1956] 2 Y.B. Int'l L. Comm'n at 255-56.

³³ U.N. Doc. A/CONF.13/C.1/L.109 (Mar. 31, 1958), U.N. Conference on the Law of the Sea, 3 Official Records, *supra* note 10, at 241.

³⁴ *Id.*

³⁵ U.N. Doc. A/CONF.13/C.1/L.101 (Mar. 27, 1958), U.N. Conference on the Law of the Sea, 3 Official Records, *supra* note 10, at 227, 228. The new paragraph is now Article 7(1) of the Convention.

When Article 7 was considered in committee, the United States withdrew its amendment in favor of the United Kingdom's.³⁶ The latter was adopted, immediately followed by the adoption of a twenty-four-mile closing line.³⁷ The committee made no other significant changes in Article 7, and the version reported was adopted by a plenary meeting of the conference with little discussion.³⁸

The language introduced by García Amador in 1955 was thus retained in addition to the semicircle test. This language—now the first sentence of Article 7(2)—was recognized to be imprecise, both in the 1955 debate of the International Law Commission and in the United States' 1958 proposal. Nevertheless the International Law Commission adopted the language, after adding the semicircle test, in lieu of a proposal using the semicircle test alone; and the 1958 Geneva conference left the definition unchanged. The history from 1955 through 1958, then, fails to show that the semicircle test alone was understood to be enough to qualify waters as a bay.

d. Other writing

Finally, Alaska relies on an article written after the 1958 conference by Sir Gerald Fitzmaurice, who had proposed the semicircle amendment to García Amador's definition in 1955 and who was a delegate to the Geneva conference in 1958. In this article, Fitzmaurice quoted the first sentence of Article 7(2) and then continued:

However, in the interests of precision, *the Commission went further than this, and proposed a definite criterion*

³⁶ U.N. Conference on the Law of the Sea, 1st Comm., 47th mtg., 3 Official Records, *supra* note 10, at 144.

³⁷ *Id.* at 146.

³⁸ U.N. Conference on the Law of the Sea, 19th plen. mtg., 2 Official Records, *supra* note 10, at 61, 63.

for the relationship of penetration to width, and this is now embodied in the Convention as follows: "An indentation shall not, however, be regarded as a bay unless its area is as large as or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation." Other technical points are embodied in the article, but what it comes to on a rough general description is that, to be a bay, an indentation must penetrate inland to a distance equivalent to at least half its breadth at the mouth. This is not a specially exacting criterion, but it is sufficient to ensure that mere curvatures or only moderate depressions do not rank as bays As the International Law Commission said in paragraph (1) of their Commentary on the article on bays, a definition of what constituted a bay proper "was necessary in order to prevent the system of straight baselines from being applied to coasts whose configuration does not justify it, on the pretext of applying the rules for bays."

Fitzmaurice, *The Territorial Sea and the Contiguous Zone*, 8 Int'l and Comp. L.Q. 73, 84 (1959) (Ak. Ex. 85-406) (Alaska's emphasis, AB 183; footnotes omitted). Alaska reads this passage as saying that the semicircle test was included in Article 7(2) to give a mathematical formulation for the otherwise too subjective criteria for a bay. From that it concludes that the semicircle test provides not only a necessary condition, but a sufficient condition, for waters to be landlocked and qualify as more than a mere curvature of the coast.

I cannot agree with the conclusion. Fitzmaurice's article itself, in the last sentence quoted, makes clear that the concern was to state a necessary condition, a relatively precise minimum requirement, for waters to qualify as a bay. The drafters were clearly concerned to prevent nations from claiming too much as inland waters. The language they adopted—that "[a]n indentation shall not . . . be regarded as

a bay unless" it meets the semicircle test—was well adapted for that purpose. The drafters did not display a corresponding concern that nations might claim too little as inland waters. Hence there was no political impetus to make the full definition of a bay as precise as the necessary condition supplied by the semicircle test. Accordingly, it would be unjustified to elevate the semicircle test to a sufficient condition, as Alaska wishes to do.

Alaska has also called attention to two other publications. Both refer to the 1982 Convention on the Law of the Sea, Article 10 of which is nearly identical to Article 7 of the 1958 Convention. United Nations Convention on the Law of the Sea, *done* Dec. 10, 1982, in *The Law of the Sea*, U.N. Sales No. E.83.V.5 (1983).

The more significant of these citations is to a United Nations report. U.N. Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Baselines, an Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, U.N. Sales No. E.88.V.5 (corrected printing 1989). This study was prepared by a group of technical experts that included expert witnesses for both parties in the present proceeding: Professor Victor Prescott of the University of Melbourne, for Alaska, and Dr. Robert W. Smith of the Department of State, for the United States. See *id.* at 66–68. In its exposition of the article on bays, the study may be read as saying that it is sufficient for an indentation to meet the semicircle test. *Id.* at 29, para. 67. It is better read, however, as ambiguous on the point, for it also speaks of the subjective description in the first sentence as containing "useful phrases," *id.*; it cites the cases in which the Court has held the semicircle test a minimum requirement, *id.* at 28, para. 65 and n.18; and the introduction to the document states that it "attempts to give guidance . . . without prejudging controversial matters of law," *id.* at ix.

Alaska's second citation is to a work that does seem to

make the semicircle test a sufficient condition for a bay. 1 E.D. Brown, *Sea-Bed Energy and Mineral Resources and the Law of the Sea: The Areas Within National Jurisdiction* § 1.3.2 (1984). I read this statement as merely an incautious paraphrase. Its context is an introductory overview of the rules for inland and territorial waters; the treatment of bays consists of a single paragraph; and there is no supporting reasoning or citation of authority.³⁹

I will thus treat the first sentence of Article 7(2) as imposing requirements supplementary to the semicircle test of the second sentence.

D. Application of Article 7(2)

The first sentence of Article 7(2) requires that a bay be "a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast." The parties have approached this sentence in terms of four interrelated questions: whether south Harrison Bay is a well-marked indentation, how deeply it penetrates the coast, whether it constitutes more than a mere curvature of the coast, and whether it contains landlocked waters. I will treat these questions in the following order:

1. Is there, *prima facie*, a well-marked indentation? If so:
2. Is its penetration in such proportion to the width of its mouth as to make it more than a mere curvature of the coast?
3. Is its penetration in such proportion to the width of its mouth as to contain landlocked waters?

³⁹ On the other hand Westerman, who also examines the history, finds the Court's construction in the *Louisiana Boundary Case*, *supra* page 183, to be the more reasonable one. Gayl S. Westerman, *The Juridical Bay* 93–98 (1987).

Regarding questions 1 and 2, the history indicates that "well-marked indentation" and "mere curvature" refer to different parts of a spectrum, not to independent requirements.⁴⁰ Alaska's expert witness testified to a similar understanding. Tr. 2804. Accordingly, an indentation can be either well marked or a mere curvature, but it cannot be both. Thus, if question 2 is answered yes, that would confirm a *prima facie* positive answer to question 1. If question 2 were answered no, it would follow that there is no well-marked indentation after all.

The statement of question 3, like that of question 2, follows the language of Article 7(2). I note preliminarily, however, that the statement may be misleading in indicating that penetration is the sole measure of landlockedness. On the contrary, the Court has tended to treat landlockedness as a question separate from penetration. *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504 (1985). I will discuss this matter further in section D(3).

1. Initial analysis of the "well-marked indentation" question

The United States' expert witness, Dr. Smith, emphasized the combination of criteria, that is, that the indentation be well-marked, be more than a mere curvature, and penetrate far enough to contain landlocked waters. Tr. 3163, 3185-86, 3196. In his opinion, the only areas satisfying the criteria were northern Harrison Bay and the two arms of southern Harrison Bay—all of which are conceded to qualify as bays. Tr. 3161-63, 3185. Dr. Smith concluded that southern Harrison Bay as a whole was not a well-marked indentation. He explained that he found the coastline between the two arms to be relatively smooth and to continue the general east-west

⁴⁰ See, e.g., the question addressed to the Committee of Experts in 1953, *supra* note 17.

direction of the coast beyond the Colville River delta in the Jones Islands area. Tr. 3161; see also figure 4.1; Tr. 3170-71, 3173-74.

Dr. Smith's position is similar to that taken by the inter-departmental Baseline Committee,⁴¹ which was responsible for the United States' original decision to close only the two arms of southern Harrison Bay. The record indicates that, since the Baseline Committee was established in 1970, it has considered Harrison Bay on four occasions.⁴² On each occasion, the Committee closed at most the two arms.⁴³ Its most recent minutes on the subject state:

⁴¹ Formally, the Committee on the Delimitation of the United States Coastline. See *supra* section III, pages 166-67.

⁴² The Committee considered Harrison Bay in 1970, 1973, 1976, and 1982. For the Committee's minutes and related reports of its actions, see U.S. Exs. 85-115, -116 (1970); Ak. Ex. 85-279, U.S. Ex. 85-117 (1972-73); U.S. Exs. 85-118, -119 (1976); Ak. Ex. 85-327, U.S. Exs. 85-120 to -124 (1981-82).

Reconsideration in 1973 appears to have been prompted by the Navy's action of May 19, 1972, purporting to extend the boundaries of NPR-4 (now called the National Petroleum Reserve-Alaska) to include both northern and southern Harrison Bay. See Ak. Exs. 85-270, -271, -275, and section VIII(A), *infra*. For the 1976 action, the minutes explain that the matter "may be relevant in litigation over the boundaries" of the Petroleum Reserve. U.S. Ex. 85-118. The 1982 consideration is similarly described in the minutes as "an issue which may arise soon" in the present litigation. U.S. Ex. 85-122.

⁴³ The minutes of July 27, 1970 (U.S. Ex. 85-116) state, "From Atigaru Point a closing line will be drawn south to the shore at about 150°34' W." If the report in the minutes is correct, the Committee's decision was to close southern Harrison Bay as a whole, by a line considerably seaward of any closing line suggested in the present proceeding. It seems likely, however, that the minutes contain a typographical error and that 151°34' W. was the intended terminus. The latter line, which closes only the west arm, is consistent with the Committee's later deliberations on that area, see U.S. Ex. 85-121, and the stated terminus of 150°34' would have been off the chart the Committee was considering, see Ak. Ex. 85-911C.

The Committee . . . decided that, even if the southeastern portion of Harrison Bay met the semi-circle test, it should not be closed off as a bay because it is not a well-marked indentation of the coast. . . . This decision is consistent with previous practice in double-headed bays such as Shelikof Bay/Gilmer Bay and Tenakee Inlet/Fresh Water Bay

Minutes of April 14, 1982 (U.S. Ex. 85-124).⁴⁴

Alaska's witness on Harrison Bay, Dr. Prescott, paraphrased the words "a well-marked indentation" as "a recess which can be easily recognized without any uncertainty." This requirement he found to be satisfied. Tr. 2805-06. Dr. Prescott also compared well-marked indentations with mere curvatures of the coast, reviewing a variety of formations on the southern coast of Australia. Tr. 2827-29; Ak. Ex. 85-405.

The criteria are admittedly subjective. For the initial requirement of a well-marked indentation, I find Alaska's expert witness more persuasive. I agree that the recess can be identified without any uncertainty; indeed, it is marked by two quite deep indentations, one at each side. The United States says the coastline between these indentations merely continues the direction of the coast beyond the Colville River delta, east of the recess. But the delta creates a bulge in the coastline, and no reason for ignoring its existence has been suggested. The United States' witness also acknowledged that, west of the recess, the coastline does shift direction. Tr. 3161.

It has not been suggested that the Baseline Committee's

⁴⁴ On this occasion, the Committee also considered the possibility of closing both north and south Harrison Bay by a single closing line. It was found, however, that such a closing line would be 39.8 nautical miles long and that the combined area would fail the semicircle test. U.S. Exs. 85-121, -122.

determination should be decisive. Cf. Tr. 3461. I will examine the precedents cited by the Committee in section D(3)(c).

The United States argues, however, that the subsidiary bays should be disregarded in determining whether south Harrison Bay is more than a mere curvature of the coast. I disagree. In section C, I found that the two sentences of Article 7(2) provide different tests for a bay. Surely, though, all the tests should be applied to the same area. In carrying out the semicircle test of the second sentence, Dr. Smith and Dr. Prescott both included the two arms of south Harrison Bay as part of the indentation. Tr. 2789-90, 3182, 3185. That procedure was consistent with *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 48-53 (1969), in which the Court said that subsidiary indentations could be included, for purposes of the semicircle test, if the combined areas could "reasonably be deemed a single large indentation." 394 U.S. at 53.⁴⁵ Unlike the situation in the *Louisiana Boundary Case*, the arms of south Harrison Bay are not separated from the outer indentation by strings of islands or any other features. It would be inconsistent to include the arms for purposes of the second sentence of Article 7(2) but to exclude them for the first.

⁴⁵ The question in the *Louisiana Boundary Case* was "whether and to what extent indentations within or tributary to another indentation can be included in the area of the latter for purposes of the semicircle test." 394 U.S. at 48. Louisiana argued that such indentations should always be included; the United States, that inner bays should be included "only if they can reasonably be considered part of the single, outer indentation." *Id.* at 51. The particular areas in question included Ascension Bay (the outer indentation) and Barataria and Caminada Bays, which were separated from Ascension Bay by strings of islands. The Court held that the islands should be ignored. Without them, it found the entrance to the inner bays wide enough that, even under the United States' approach, the combined bays could reasonably be considered a single large indentation. *Id.* at 52-53.

In support of excluding the arms of south Harrison Bay for the purpose of the curvature question, the United States refers to *Re Dominion Coal Co.*, 40 D.L.R. 2d 593 (Sup. Ct. N.S. 1963), discussed in 1 O'Connell, *supra* page 182, at 400-02. This Nova Scotian case dealt with whether Cape Breton County had taxing jurisdiction in Spanish Bay, a broad shallow indentation containing two subsidiary indentations. The court held that Spanish Bay was not part of the county, four judges agreeing that it was not inland water. 40 D.L.R. 2d at 599, 632-33, 645, 653.⁴⁶ Judge Patterson, ignoring the subsidiary indentations, found that "the indentation of Spanish Bay is as a whole a rather gentle inward curve." *Id.* at 645.⁴⁷ Although the case thus provides some support for the United States, the controlling precedent is the

⁴⁶ For three of these judges, the result also rested in part on interpretation of an 1824 Order in Council that established the county's boundaries as running "along the sea shore, across the entrances of all the Harbours and Rivers"—without mentioning the entrances to bays. 40 D.L.R. 2d at 633, 646, 652-53. The fourth judge construed the Order in Council to include "all interior or national waters" within the county. *Id.* at 599.

⁴⁷ In dissent, however, Judge Currie took the subsidiary indentations into account and found Spanish Bay to be a well-marked indentation:

I think an examination of the map . . . establishes that Spanish Bay has those characteristics which readily mark a water as a bay, and in this instance is an inland water. Such an examination should not overlook nor dismiss the two heavily marked indentations of the two large estuaries created by the estuary of the Little Bras d'Or entrance to the Bras d'Or lakes to the north of Spanish Bay and the large estuary that is the great harbour of Sydney and Sydney River to the south of Spanish Bay. I can find no authority in the many cases I have read which holds or even suggests that in the determination of what is a bay such estuaries with their obvious deep and wide indentation should be excluded from consideration. I can find no authority which says that merely because the estuary of Sydney Harbour is in fact a harbour, that therefore it should not receive its proper designation as a well-marked indentation in Spanish Bay. I think that even without Little Brass [sic] d'Or and Sydney Harbour, it can be said that

Louisiana Boundary Case, *supra* page 203. Moreover, *Dominion Coal Company* was based on pre-Convention law. 40 D.L.R. 2d at 601-02, 610, 632-33. The court did not consider how its treatment of the indentations would mesh with the application of the semicircle test to Spanish Bay.

I thus tentatively conclude that southern Harrison Bay is a well-marked indentation. To test this conclusion, I next consider whether, under Article 7(2), its "penetration is in such proportion to the width of its mouth as to . . . constitute more than a mere curvature of the coast."

2. Penetration and mere curvature

As Dr. Prescott testified for Alaska, the depth of penetration can be measured in a number of ways. Tr. 2806-24. For example, one method would draw the penetration line at the midpoint of the closing line and perpendicular to it. Another method would draw the perpendicular wherever on the closing line it penetrates most deeply. In a perfect semicircle, either method would produce the same penetration line, with a ratio of 1:2 (radius:diameter), or 50%.

For southern Harrison Bay, Dr. Prescott applied the second method and obtained ratios deeper than for a semicircle. Using a closing line close to that later agreed on by the parties, he obtained figures ranging from 53.05% to 65.29%. For north Harrison Bay (conceded to be a juridical bay), the corresponding figure was 58.36%.⁴⁸ Ak. Exs. 85-402, 85-921; Tr. 2808-14.

Spanish Bay is a well-marked indentation. The inclusion of these estuaries puts the matter beyond doubt.

40 D.L.R. 2d at 613.

⁴⁸ The range of figures for southern Harrison Bay reflected two questions. One was whether the penetration line would be permitted to cross water only, to cross an island, or to cross part of the mainland as well. The other concerned the closing line length to be used in calculating the

A third method, suggested by Hodgson and Alexander as representing "the most logical method" for "determining true penetration of the water into the land," is to use as the penetration line "the longest straight line which may be drawn from any point on the closing line to the head of the bay."⁴⁹ Here the penetration and closing lines need not be perpendicular. Although there was some question as to how to identify the head of the bay, Dr. Prescott applied this method and derived penetration ratios as high as 120% for south Harrison Bay and 97% for north Harrison Bay. Tr. 2818-20; Ak. Ex. 85-404.

Still a fourth method, preferred by Dr. Prescott, was "the shortest line from the point of deepest penetration to the closing line of the bay." Tr. 2821. Using this method, he drew the penetration line as a sequence of four straight-line segments, Ak. Ex. 85-920K, and obtained a penetration ratio of 71.09% to 76.67%.⁵⁰ Tr. 2823; Ak. Ex. 85-402. Again this compared with 58.36% for north Harrison Bay. Tr. 2824.

The United States, however, objects to settling on any one specific penetration measure and argues that "the true inquiry" should go to "the feature's entire configuration in penetrating the land." USB 100. Its expert witness, Dr. Smith, criticized some of the measures, Tr. 3222-24, 3252-53, and suggested that the measurement of penetration called

ratio: either a straight line between the extreme headlands, or the shorter actual closing line, which, because of an island, is broken into segments. For northern Harrison Bay, there is a single figure because neither of these issues arises.

⁴⁹ Robert D. Hodgson & Lewis M. Alexander, *Towards an Objective Analysis of Special Circumstances* 8 (Law of the Sea Inst., Univ. of R.I., Occasional Paper No. 13, 1972) (Ak. Exs. 85-401, -403; U.S. Ex. 85-222).

⁵⁰ Again depending on the closing line length to be used. See *supra* note 48. The line segments were permitted to cross islands but not the mainland. Tr. 2823.

for a subjective judgment, Tr. 3230. In particular, the United States notes that all Dr. Prescott's penetration lines went into the western arm, not the shallower central part of the indentation whose status as inland waters is in dispute.

The fact that Dr. Prescott's lines all go to the western arm does not make them objectionable *per se*. The court held otherwise in the *Anglo-Norwegian Fisheries Case*, 1951 I.C.J. 116, 141, which was the very case from which the penetration requirement of Article 7(2) was drawn.⁵¹

The base-line between points 11 and 12, which is 38.6 sea miles in length, delimits the waters of the Svaerholt lying between Cape Nordkyn and the North Cape. The United Kingdom Government denies that the basin so delimited has the character of a bay. Its argument is founded on a geographical consideration. In its opinion, the calculation of the basin's penetration inland must stop at the tip of the Svaerholt peninsula (Svaerholtklubben). The penetration inland thus obtained being only 11.5 sea miles, as against 38.6 miles of breadth at the entrance, it is alleged that the basin in question does not have the character of a bay. The Court is unable to share this view. It considers that the basin in question must be contemplated in the light of all the geographical factors involved. The fact that a peninsula juts out and forms two wide fjords, the Laksefjord and the Porsangerfjord, cannot deprive the basin of the character of a bay. It is the distances between the disputed baseline and the most inland point of these fjords, 50 and 75 sea miles respectively, which must be taken into account in appreciating the proportion between the penetration inland and the width at the mouth. The Court concludes that Svaerholthavet has the character of a bay.

I conclude that the penetration of south Harrison Bay, by whatever measure, is ample to make it more than a mere cur-

⁵¹ See *supra* page 191.

vature of the coast. This conclusion confirms the tentative finding of the previous section that south Harrison Bay is a well-marked indentation.

3. *Penetration and landlocked waters*

The last question is whether, under Article 7(2), south Harrison Bay has "penetration in such proportion to the width of its mouth as to contain landlocked waters." Despite this language of the article, the relationship between penetration and landlockedness is unclear. The United States suggests that the test of sufficient penetration is whether the enclosed waters are landlocked, USB 101, but its expert, Dr. Smith, said that landlockedness is a very difficult concept to pinpoint, Tr. 3174. For Alaska, Dr. Prescott testified to various possible interpretations of "landlocked waters." Tr. 2824-26, 2859-64, 2869. At final argument, Alaska took the position that in view of the vagueness of the term, landlockedness should be judged in terms of the objective measures of penetration discussed in section D(2), *supra*. Tr. 3606-07, 3629-30.

a. *The meaning of "landlocked waters"*

The phrase "landlocked waters" in Article 7(2) was drawn from a dissenting opinion in the *Fisheries Case*, 1951 I.C.J. 116, 163 (McNair, J.). See *supra* page 191. The opinion gives little guidance as to the meaning of the phrase, for Judge McNair used it not to define bays but to classify them:

There are two kinds of bay in which the maritime belt is measured from a closing line drawn across it between its headlands, that is to say, at the point where it ceases to have the configuration of a bay. The first category consists of bays whose headlands are so close that they can really be described as landlocked. . . .

The other category of bay whose headlands may be

joined for the purpose of fencing off the waters on the landward side as internal waters is the historic bay

1951 I.C.J. at 163-64. When the International Law Commission made "landlocked waters" part of the definition of a bay, it did so despite the rapporteur's specific criticism that the phrase was imprecise.⁵²

The Supreme Court considered the meaning of "landlocked waters" in *United States v. Maine (Rhode Island and New York Boundary Case)*, 469 U.S. 504 (1985):

The Convention does not define "landlocked," and this Court has not yet felt it appropriate to offer a comprehensive definition of the term. Scholars interpreting the Convention have given the term a subjective and common-sense meaning. We agree with the general proposition that the term "landlocked" "implies both that there shall be land in all but one direction and also that it should be close enough at all points to provide [a seaman] with shelter from all but that one direction."

469 U.S. at 525 (footnote omitted) (quoting P.B. Beazley, *Maritime Limits and Baselines: A Guide to Their Delineation* 13 (The Hydrographic Society, Spec. Pub. No. 2, 2d ed. rev. 1978) (U.S. Ex. 85-229)). The Court also noted that "the term 'landlocked' is not to be literally applied," 469 U.S. at 525 n.18, and it quoted Hodgson and Alexander, *supra* note 49, at 6, 8:

The concept of land-locked is imprecise and, as a result, may call for subjective judgments. . . . Basically, the character of the bay must lead to its being perceived as part of the land rather than of the sea. Or, conversely, the bay, in a practical sense, must be usefully sheltered and

⁵² *Summary Records of the 318th Meeting*, June 23, 1955, [1955] 1 Y.B. Int'l L. Comm'n, *supra* note 10, at 207. See generally *supra* pages 191-92.

isolated from the sea. Isolation or detachment from the sea must be considered the key factor.

469 U.S. at 525 n.19.

The question in the *Rhode Island and New York Boundary Case* was whether Long Island Sound and Block Island Sound constituted a juridical bay under Article 7. 469 U.S. at 505. The Court first found that Long Island should be treated as an extension of the mainland and that a bay was therefore formed. *Id.* at 514–20. It then turned to the question of the proper closing line. *Id.* at 520–26.⁵³

The Special Master's conclusion, to which the States took exception, was that the closing line should run essentially straight north from Montauk Point (the eastern tip of Long Island) to Watch Hill Point, a distance of fourteen nautical miles. This line enclosed only part of Block Island Sound. The States argued for a line from Montauk Point northeast to Block Island and then north to the mainland at Point Judith, a total of twenty-two miles. The Court, noting that Block Island was eleven miles from the line from Montauk Point north to Watch Hill Point, characterized the States as arguing "that an island well beyond what would otherwise be the mouth of the bay can cause the bay to have an entirely different mouth." *Id.* at 524. It rejected this contention on the ground that, "under any reasonable interpretation of the Convention, Block Island is too removed from what would otherwise be the closing line of the bay to affect that line." *Id.*⁵⁴

⁵³ For a chart clearly showing the alternative closing lines, see *United States v. Maine (Rhode Island and New York Boundary Case)*, Report of Special Master Walter E. Hoffman, app. C (Oct. Term, 1983) (U.S. Ex. 85-125), reprinted in *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases, 1949–1987* (Michael W. Reed, G. Thomas Koester, & John Briscoe eds., 1991), at 809, exceptions overruled, 469 U.S. 504 (1985).

⁵⁴ Block Island was also seaward of a line running directly from Montauk Point to Point Judith. The Court noted that that line exceeded the

The Court went on to note that "most significantly, some of the waters enclosed by the suggested closing line [based on Block Island] are not landlocked, as required by the Convention." *Id.* at 525. The extra area that would be included was described as "not in the sheltered confines of what the Convention is willing to recognize as a bay," as "exposed to the open sea on two sides," and as "not predominantly surrounded by land or sheltered from the sea." *Id.* at 526. The Court concluded that this was "the nearly inevitable result . . . of a theory that would treat islands well beyond the natural entrance points of an indentation as creating multiple mouths to that indentation." *Id.*

b. *Adaptation of the Court's test*

In the *Rhode Island and New York Boundary Case*, the question whether waters were landlocked arose in the context of deciding where to put a closing line. The situation in southern Harrison Bay is somewhat comparable. Whereas there is no question of extending out into the ocean beyond natural entrance points, there is a question of whether to employ a pair of closing lines, one for each arm, or to close the area as a whole.

The Court indicated in the *Rhode Island and New York Boundary Case* that whether waters were landlocked should be determined from the mariner's point of view⁵⁵ and, in

twenty-four-mile maximum for a closing line. 469 U.S. at 521–22, 525. A nearby line, from Montauk Point to the Point Judith Harbor Works, was just under twenty-four miles, but the Court found it unnecessary to pass on whether the harbor works could qualify as a headland. *Id.* at 522 n.13.

⁵⁵ A thoroughgoing adoption of the mariner's point of view would no doubt require recourse to many factors, such as the direction and strength of the winds, the height of surrounding land, and the depth of the waters. See Tr. 2860–61. On the other hand, it has been suggested that the twenty-four-mile limit on a closing line is too high to be compatible with

particular, that there should be land in all but one direction. There, the area that the States' closing line would have added to inland waters formed a four-sided figure, two sides of which (from Montauk Point to Block Island and from Block Island to Point Judith) were largely open to the sea. In Harrison Bay, of the area that Alaska's closing line would add to inland waters, only one side (from the island near Atigaru Point to the Nechelik Channel) would be open.

The United States argues, however, and its expert witness testified, that the added area in Harrison Bay is open to the sea from two directions, the north and the east. Tr. 3174-75, 3230-33, 3624. Alaska replies that this is an accident of the way the indentation happens to be oriented. If it were rotated so that the proposed closing line ran due east from Atigaru Point rather than southeast, then the combined areas would in fact be open only to the north. Tr. 3598-99. The point is valid, but it is insufficient to establish that the waters

the notion of landlockedness in the mariner's sense. Tr. 2869; Beazley, *supra* page 209, at 13; Kathleen L. Walz, *The United States Supreme Court & Article VII of the 1958 Convention on the Territorial Sea & Contiguous Zone*, 11 U.S.F. L. Rev. 1, 15 (1976). Hodgson and Alexander, writing before the *Rhode Island and New York Boundary Case*, went so far as to state, "The nature of a bay is determined by its two dimensional character . . ." Hodgson and Alexander, *supra* note 49, at 20. The United States cites this last passage and adds, USB 98:

Depth of the waters, their utility, considerations of defense or economic importance are not germane. Also, although many publicists have suggested additional objective criteria to be superimposed on those of Article 7(2), none [for landlocked waters] have been accepted in customary international law or adopted in practice by the United States.

Whatever may be the ideal approach to applying the mariner's point of view, the record in this case does not enable me to go beyond a two-dimensional analysis. In any event such an analysis seems justified by the difficulties that would arise in developing fuller data and fuller criteria to apply to those data.

should be considered landlocked. By a similar rotation, any curvature of the coast, however slight, could be given an east-west line between headlands, leaving the waters open only to the north. Therefore, the extent to which the waters of south Harrison Bay are open to the sea seems better measured by angles than by cardinal directions.

The next observation is that the waters within different parts of an indentation will be open to the sea to varying extents. Inside an indentation that was a perfect semicircle, the waters at every point along the coast would be open to the sea for exactly 90 degrees. As one moves away from the coast and toward the closing line, the angle of exposure increases until, at the closing line itself (along an otherwise straight coastline), the waters would be open to the sea for 180 degrees.⁵⁶ Accordingly, the most appropriate place to measure exposure within an indentation appears to be along the coast.

In a somewhat irregular indentation, the waters along the coast may at some points be exposed more broadly and at other points more narrowly than in a semicircle.⁵⁷ In gen-

⁵⁶ These results follow from a theorem of Euclid: "In a circle the angle in the semicircle is right, that in a greater segment less than a right angle, and that in a less segment greater than a right angle . . ." Euclid, 2 *The Thirteen Books of Euclid's Elements*, Book III, Proposition 31, at 61 (Thomas L. Heath trans., 2d ed., Dover reprint 1956) (ca. 300 B.C.). A circle may be divided into two segments by drawing a straight line through it. An "angle in a segment" is defined as "the angle which, when a point is taken on the circumference of the segment and straight lines are joined from it to the extremities of the straight line which is the *base of the segment*, is contained by the straight lines so joined." *Id.*, Definition 8, at 1. For an alternate presentation of the material, see, e.g., James E. Thompson, *Geometry for the Practical Man* 118-19 (M. Peters ed., 3d ed. 1962).

⁵⁷ For example, in an irregular bay that narrowly meets the semicircle test, some parts of the coastline will be deeper than the radius of the semicircle and others will be shallower. The latter may be exposed for more than 90 degrees. For an illustration, see Walz, *supra* note 55, at 23. Ac-

eral, the comparison may be made by overlaying on the indentation a semicircle whose diameter coincides with the proposed closing line. At points on the coast lying outside the semicircle, the exposure will be less than 90 degrees (as measured by the angle from one end of the diameter, to the chosen point, to the other end of the diameter). Points on the coast lying within the semicircle, if protected only by the headlands of the indentation, will be exposed for more than 90 degrees.⁵⁸

tual formations of this sort include Monterey Bay, which the Court held should be closed in *United States v. California*, 381 U.S. 139, 169-70 (1965), and northern Harrison Bay in Alaska, which was closed by the Baseline Committee, Tr. 3204-09, Ak. Ex. 85-279 (draft minutes of Oct. 5, 1972).

Another example of how parts of the coast may be exposed for more than 90 degrees comes from the 45-degree test for determining the natural entrance points of a bay. This test, described in Hodgson and Alexander, *supra* note 49, at 10-12 (U.S. Ex. 85-222), and in Beazley, *supra* page 209, at 16-17 (U.S. Ex. 85-229), was referred to with approval by the Court in the *Rhode Island and New York Boundary Case*, 469 U.S. at 522 n.14. The idea is that, at the entrance to a bay, the coast should turn inland by at least 45 degrees on each side. In the illustration in Beazley, p. 16, the line A-B is a proper closing line because the inward turns are sufficient. Nevertheless, the next headlands inward are exposed to the open sea by angles of about 98 degrees (angle A-D-B) and 105 degrees (angle B-C-A).

⁵⁸ The comparison described in the text is most clearly valid where the proposed closing line is a single line segment. It would not have been directly applicable in the *Rhode Island and New York Boundary Case*, where the States' proposed closing line for Block Island Sound was broken into two segments, both of which contributed to the exposure of waters along the coast from Watch Hill Point to Point Judith. See *supra* pp. 210-11. For an indirect comparison in the *Rhode Island and New York Boundary Case*, one might overlay a semicircle on the line running directly between Montauk Point and the Point Judith Harbor Works. See 469 U.S. at 522 n.13. The whole coastline in Block Island Sound lies inside that semicircle.

For southern Harrison Bay, such a semicircle may be placed on the long segment of the single closing line (from an island near Atigaru Point to the Nechelik Channel).⁵⁹ Much of the coastline of the indentation lies outside the semicircle, not only in the arms that are already closed but also in the area that would be added to inland waters if the single closing line is adopted. These parts of the coast, exposed for less than 90 degrees, should clearly be considered open to the sea in only one direction and therefore landlocked.

The part of the coast that intrudes into the semicircle, and so is exposed for more than 90 degrees, lies primarily between the two arms of southern Harrison Bay. According to the Master's measurements, the navigator in Harrison Bay along this coastline is open to the sea for arcs of up to about 112 degrees.⁶⁰ The question is whether the waters in this area are so exposed that south Harrison Bay as a whole should not be regarded as landlocked for purposes of Article 7(2).

⁵⁹ Although the closing line has a short additional segment, from Atigaru Point to the tip of the island formation, this extra opening to the sea is located so that it does not contribute significantly to the exposure of waters in the indentation. For the detail of the closing line agreed upon, see *supra* note 5 and accompanying text.

⁶⁰ Angles were measured between the endpoints of the long segment of the proposed closing line, running on Ak. Ex. 85-920K from the island near point K to point H. For the further distance west of point K to Atigaru Point, the island formation provides protection from the sea.

The maximum exposure at the coastline occurs at about 151°25.7' W., 70°25.6' N. At that point the coast is about 3.86 nautical miles from the proposed closing line. Other points on the coast are closer to the proposed closing line, but they have smaller angles of exposure. For example, at the western end of the existing closing line for the eastern arm (about 151°19.2' W.), the proposed closing line is about 3.6 miles distant and the angle of exposure is about 102 degrees.

c. Precedents on double-headed bays

When the Baseline Committee declined to close southern Harrison Bay in 1982, it cited its previous practice on double-headed bays and referred in particular to two such formations in Alaska. *See supra* pages 201–02. Alaska has identified other formations that might be called double-headed bays and that have been closed by a single line. The United States, on the other hand, now resists application of the term “double-headed bay” to southern Harrison Bay at all. It defines the term as “a water body where a single peninsula divides or serves as a common side for two subsidiary bodies of water.” Tr. 3627. It observes that the arms of Harrison Bay are divided not by a peninsula but a “smooth, flat coastline,” and it finds the case against closing south Harrison Bay as a whole even more compelling than for the precedents cited by the Baseline Committee. *Id.*; *see also* Tr. 3169–70, 3210–11.

In fact nothing depends on the exact scope of the term “double-headed bay.” Whatever the definition, the formations adduced by the parties provide useful points for comparison with south Harrison Bay. These formations are summarized in the table on page 218 and are shown in figures 4.3 through 4.6 (pages 220–24).⁶¹

⁶¹ Figures 4.3 through 4.6 (as well as figure 4.1, *supra* page 178) are excerpts of nautical charts, sometimes referred to as chartlets. Some of the chartlets depict bay closing lines and territorial sea limits, and others show neither. Where the territorial sea is shown on United States charts, it is represented as a three-mile belt. The extension of the territorial sea to twelve miles, effected by Presidential proclamation in late 1988, is not reflected. *See* Proclamation No. 5928, 3 C.F.R. 547 (1988), *reprinted in* 43 U.S.C. § 1331 note (1988).

Small scale charts published by the National Ocean Service omit the delimitations of bay closing lines and the territorial sea. Thus, the chartlets of Harrison Bay (fig. 4.1) and of Bodega and Tomales Bays, California (fig. 4.5) do not show them. For Bodega and Tomales Bays, the bay

The figures in the table are based on the waters that would be part of the bay with a single closing line but open sea if the arms are closed individually. In each case, land lies inside the semicircle drawn on a single closing line. The part of the coastline within the semicircle may contain a single salient cape or, as in the case of south Harrison Bay, it may be relatively smooth. Column A in the table measures the angle of exposure, either at the single cape or at the point of maximum exposure along the stretch of coast. Column B gives the distance from this point to a single closing line. Column C gives the length of a single closing line. Both distances are in nautical miles. Column D gives their quotient, the distance divided by the length. It provides a measure of minimum penetration of the double-headed bay, as opposed to the measures of maximum penetration discussed in section D(2). Although the parties described only measures of maximum penetration, it appears to the Master that the penetration ratio at the most exposed point along the coast provides a more revealing comparison between double-headed formations. The last column in the table gives the decision in the

closing line has been drawn on the chartlet for illustration.

The National Ocean Service's large scale charts show the Baseline Committee's delimitation of the territorial sea and, if such delimitations are affected by the Committee's bay closing lines, they usually show the closing lines as well. Thus, the chartlet of Gilmer and Shelikof Bays, Alaska (fig. 4.4) shows the Baseline Committee's bay closing lines and resulting outer limit of the territorial sea. The chartlet of Freshwater Bay and Tenakee Inlet, Alaska (fig. 4.3) also shows the Committee's bay closing lines. While the chartlet does not extend to the resulting territorial sea delimitation, the complete chart does show it.

Finally, the chartlet of Svaerholthavet, Norway (fig. 4.6), published with the pleadings in the *Anglo-Norwegian Fisheries Case*, shows both the court's bay closing line and four-mile Norwegian territorial sea boundary as the most seaward solid and dotted lines respectively. *Memorial of the United Kingdom (U.K. v. Nor.)*, 1951 I.C.J. Pleadings (Maps, Fisheries Case), annex III (Jan. 27, 1950).

Approximate Measurements of Double-Headed Bays

Bay	(A) Maximum exposure at coast	(B) Distance from coast to single closing line	(C) Length of single closing line	(D) Minimum penetra- tion (B/C)	Decision
Tenakee/Fresh- water (Alaska)	166°	0.4 nm	5.1 nm	7.8%	Two bays ^a
Shelikof/Gilmer (Alaska)	154°	0.8 nm	7.8 nm	10.3%	Two bays ^a
Bodega/Tomales (California)	106°	1.7 nm	4.5 nm	37.8%	One bay ^b
Svaerholthavet (Norway)	115°	11.5 nm	38.6 nm	29.8%	One bay ^c
Southern Harri- son (Alaska)	112°	3.86 nm	12.0 nm	32.2%	?

^a Decisions of the Baseline Committee. Minutes of Sept. 20, 1971 (Ak. Ex. 85-259).

^b *United States v. California*, 432 U.S. 40 (1977) (second supplemental decree, entered on joint motion of the parties).

^c *Anglo-Norwegian Fisheries Case*, 1951 I.C.J. 116, 141. The figures in columns B and C are taken from the opinion. *Id.*

specific case, with a footnote as to its source. The measurements are those of the Master except as otherwise noted.⁶² All figures are approximate.

The first two entries in the table, Tenakee Inlet/Freshwater Bay and Shelikof Bay/Gilmer Bay, are the precedents relied on by the Baseline Committee in declining to close southern Harrison Bay by a single line. For Tenakee Inlet and Freshwater Bay (fig. 4.3), one closing line runs from South Passage Point to East Point; the other, from East Point to North Passage Point. Had the bays been closed by a single line running directly between North and South Passage Points, East Point would have been brought within the bay. But East Point is exposed to the open sea for about 166 degrees (as measured by the angle North Passage Point–East Point–South Passage Point). The distance inland to East Point, from a single closing line, would be only 7.8% of the length of that closing line—compared to 50% for any point on the coast in a perfect semicircle. The case of Shelikof Bay and Gilmer Bay (fig. 4.4), though slightly less extreme, is similar. Along the coast between the two present closing lines, the widest angle of exposure occurs at the northern tip of Point Mary. The angle is over 150 degrees, with penetration inland at that point of only 10.3%. Given these figures, it would be difficult to justify a finding that the waters at Point Mary and East Point were landlocked. It is not surprising that the Baseline Committee closed the arms of each pair of bays individually.

⁶² The parties were given an opportunity to check the Master's measurements and, where needed, provide corrections.

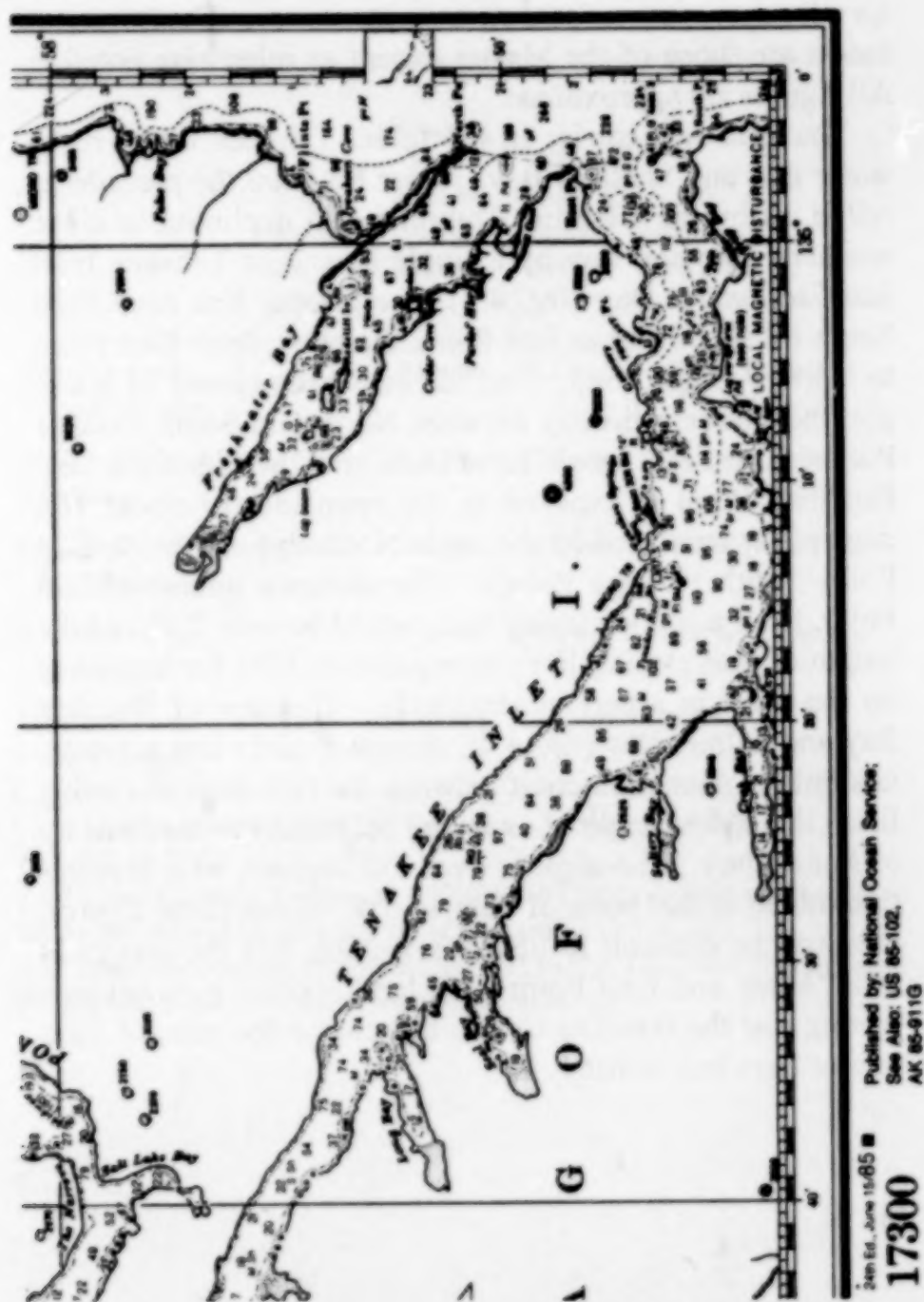


Figure 4.3. Tenakee Inlet and Freshwater Bay, Alaska.

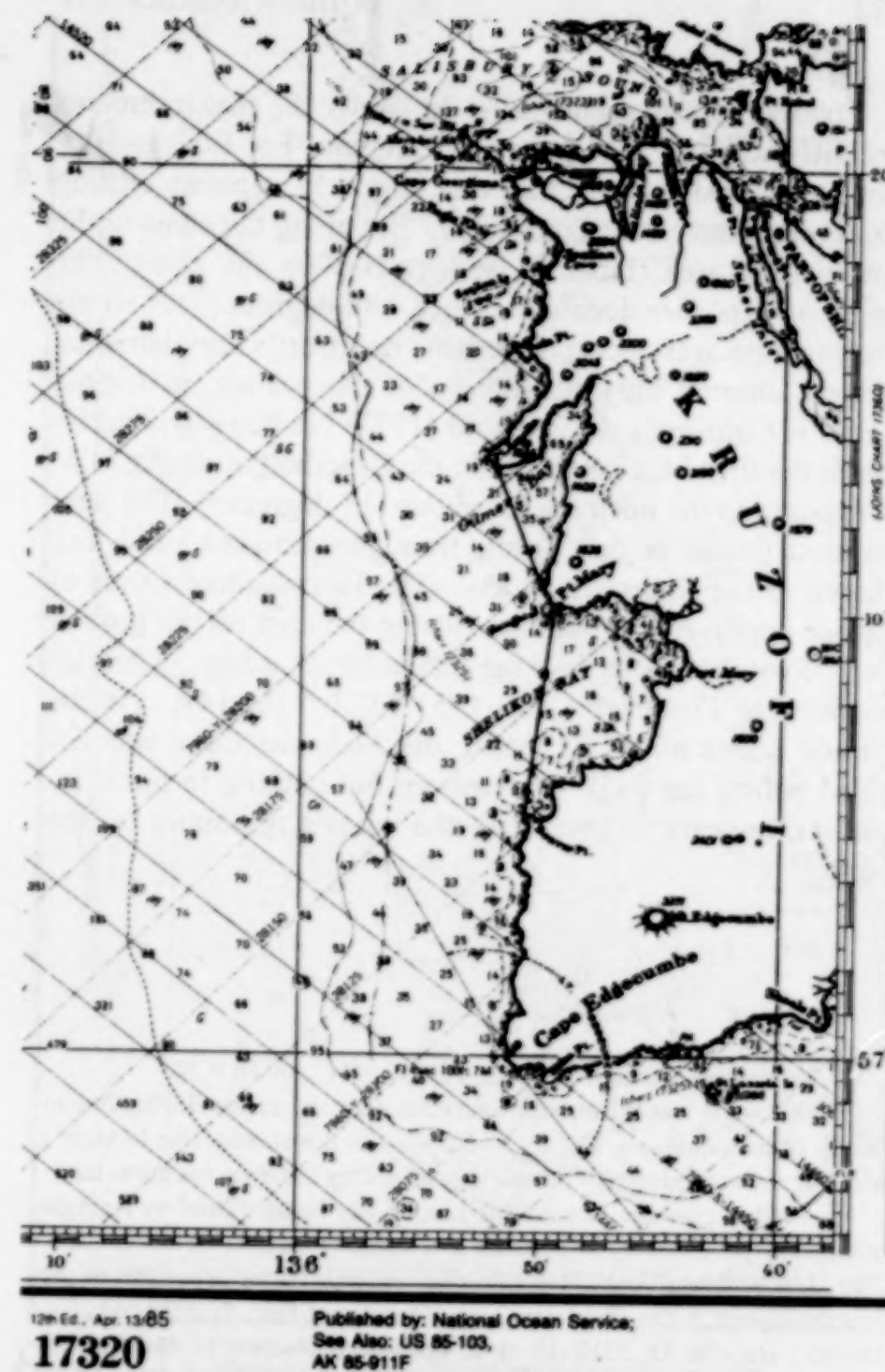


Figure 4.4. Shelikof Bay and Gilmer Bay, Alaska.

For the next two entries in the table, the measurements are different, and the results are different. For Bodega Harbor and Tomales Bay, California (fig. 4.5), separate closing lines might have been considered. But along the coast in the intervening area (labelled Bodega Bay on the chart), the angle of exposure does not exceed 106 degrees.⁶³ A single closing line was incorporated in the Court's supplemental decree, entered on joint motion of the parties, in *United States v. California*, 432 U.S. 40 (1977). In Norway, a mariner at the tip of the peninsula in the Svaerholthavet (fig. 4.6) is exposed to the open sea for about 115 degrees.⁶⁴ The penetration inland at that point, from the seaward solid line shown in the figure, is 29.8%. The International Court of Justice approved the baseline closing the area on the ground that "Svaerholthavet has the character of a bay." Anglo-Norwegian *Fisheries Case*, 1951 I.C.J. 116, 141. As the United States notes, Tr. 3626, the *Fisheries Case* was decided before the 1958 Convention; but nothing in the Convention appears to invalidate the court's reasoning on the point.⁶⁵

⁶³ The maximum occurs at about 122°59.5' W., 38°16.9' N.

⁶⁴ This angle was measured from the eastern end of the closing line to the tip of the peninsula, and then northwest to the closing line in such a way that the second side of the angle just touches but does not cross land.

⁶⁵ Another example of a double-headed bay being closed by a single baseline is provided by Albemarle and Pamlico Sounds in North Carolina. The Baseline Committee combined the pair on the precedent of the Svaerholthavet in the *Fisheries Case*. Minutes of Dec. 7, 1970 (Ak. Ex. 85-105); see also Tr. 3212-15. I do not take this action of the Baseline Committee into account, however, because the geographical situation on the North Carolina coast is distinguished by the presence of barrier islands. See Tr. 3286-87, 3613-14, 3626.

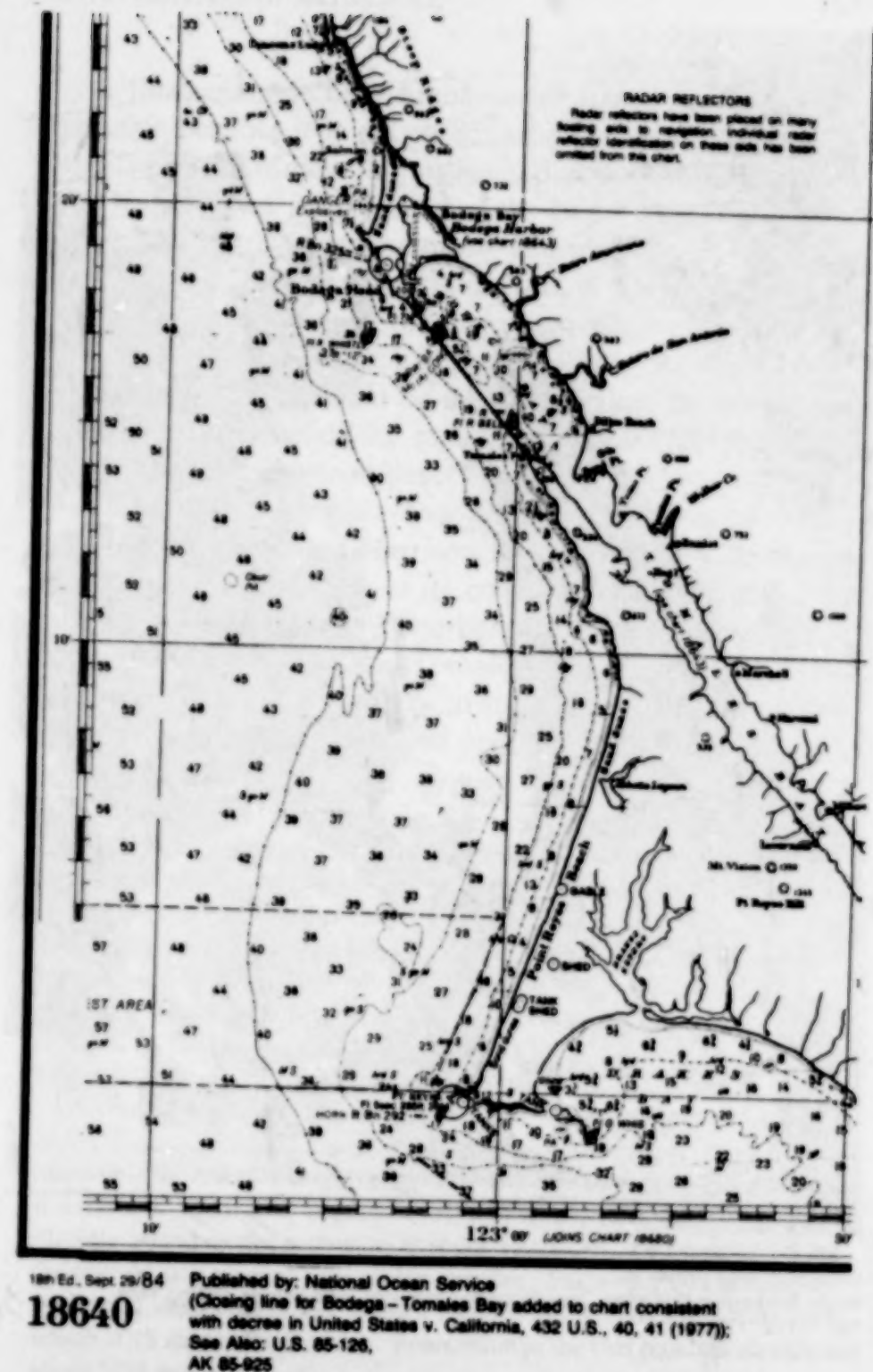


Figure 4.5. Bodega Harbor and Tomales Bay, California.



Excerpt of Map Annex III,
Anglo Norwegian Fisheries Case (adopting seaward solid line as closing line),
1951 I.C.J. 116; 141;
See also; AK 85-922

Figure 4.6. Svaerholthavet, Norway.

A final example of a double-headed bay—omitted from the table because it is not so described by the parties or the Baseline Committee—is northern Harrison Bay (fig. 4.1). The Kogru River forms one arm, the larger rounded indentation to the north forms the other, and the two are joined by the peninsula ending at Saktuina Point.⁶⁶ Depending on the method of measurement, the maximum angle of exposure is at least 106 degrees, with a penetration ratio not over 33%.⁶⁷ If a semicircle is overlaid on the closing line, the proportion of land to water inside the semicircle appears comparable to that in southern Harrison Bay.

This comparison with other double-headed bays strongly suggests that southern Harrison Bay should be closed as a single bay. The waters at its coastline are exposed to the open sea for at most 112 degrees, within the general range represented by Bodega and Tomales Bays, northern Harrison Bay, and the Svaerholthavet. In southern Harrison Bay, natural entrance points are agreed upon, and there is no attempt to extend the closing line seaward of them. The area that

⁶⁶ Originally the Baseline Committee excluded the Kogru River from the area of the indentation and found that the indentation just failed the semicircle test. Minutes of July 27, 1970 (U.S. Ex. 85-116). Later the Committee received information that the Kogru River, despite its name, was a bay. With its inclusion, the semicircle test was satisfied, and the area was closed by a line from Cape Halkett to Atigaru Point. Draft minutes of Oct. 5, 1972 (Ak. Ex. 85-279). On this later analysis, the Kogru River clearly becomes an arm of northern Harrison Bay.

⁶⁷ The angle Cape Halkett-Saktuina Point-Atigaru Point, as measured on NOS chart 16004, is about 113 degrees. The actual exposure of Saktuina Point is somewhat less because of the nearby Eskimo Islands, but it measures about 102 degrees even taking the islands into account. Slightly inland on the peninsula, at about 152°8' W., the exposure taking the islands into account rises to 106 degrees. Saktuina Point and the inland point, respectively, are 5 and 6 nautical miles from the closing line, which is 18 nautical miles long. Penetration at the two points is therefore about 28% and 33%.

would be added to inland waters is roughly semicircular, with the defect only that some parts of the indentation are seaward of the circumference of a perfect semicircle. Other parts, landward of that circumference, are exposed for less than 90 degrees. Even at the most exposed point, there is penetration of 32.2%,⁶⁸ comparable to that in the other formations closed as a single bay. This is a measure of the minimum penetration of the indentation; the maximum penetration, by the various tests discussed in section D(2), *supra*, is at least 53% and by one measure 120%. I conclude that southern Harrison Bay has penetration in such proportion to the width of its mouth as to contain landlocked waters.

E. Conclusion

Since all the tests of the Convention are satisfied, I recommend that southern Harrison Bay be treated as a single bay with one closing line. In the terms of question 15, I recommend that the southern portion of the area shown as "Harrison Bay" on NOS chart 16064 be held a juridical bay, as contended by Alaska. The parties agreed on the closing line to be used in the event that this was the Master's recommendation. I further recommend that the location of the line enclosing the inland waters of the bay be that so agreed on.

⁶⁸ For supporting details, see *supra* notes 5 (description and length of single closing line) and 60 (location of most exposed point; distance to single closing line).

V DINKUM SANDS

Large sections of Alaska's Arctic coast are fringed by barrier islands. The principles governing federal and state rights in the presence of islands were considered at length in section III.

Dinkum Sands is a small formation in the leased area that may or may not qualify as an island. Question 5 of the Joint Statement asks:

Is the formation known as Dinkum Sands an island constituting part of Alaska's coast line for purposes of delimiting Alaska's offshore submerged lands?

The formation is shown in figure 1.1, at approximately 70°25.5' north latitude, 147°46' west longitude. It lies between Narwhal Island and Cross Island, four to five nautical miles from each, and within eight nautical miles of the mainland. The entrance to Prudhoe Bay is about ten nautical miles away.

If the answer to question 5 is yes, then Alaska owns a three-mile belt of submerged lands around Dinkum Sands. The area of this belt is roughly twenty-eight square miles. If the answer to question 5 is no, then Alaska's rights in the immediate vicinity are limited to three-mile belts around Cross and Narwhal Islands. See figure 3.2.¹

Hearings on question 5 were held from July 16 through August 2, 1984. The Inupiat Community of the Arctic Slope and the Ukpeagvik Inupiat Corporation participated as recommended intervenors, in accordance with the Special Master's Report of January 10, 1984. All parties submitted briefs in March 1985, and Alaska and the United States sub-

¹ This analysis assumes that waters landward of islands are not Alaska's on a theory of straight baselines or a theory of assimilation of waters to the territorial sea. I rejected these theories in section III, *supra*.

mitted reply briefs in May 1985.² Final argument on question 5 was held on June 18, 1986.

In addition, during a visit to Alaska in 1980, the Special Master traveled to Dinkum Sands by helicopter and ship in the company of counsel for the United States and Alaska. The trip included a landing on Cross Island on July 31 and, on August 1, the taking of soundings at Dinkum Sands from a small launch. The feature was submerged at the time.

A. The legal structure

Under the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988), Alaska is entitled to a three-mile belt of submerged lands measured from its coastline. Under the Court's interpretation of the Submerged Lands Act in *United States v. California*, 381 U.S. 139 (1965), the term "coast line" is in general to conform to the baseline under the Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205 (entered into force 1964). See generally section II, *supra*.

The parties agree that, for Dinkum Sands to form part of Alaska's coastline for purposes of the Submerged Lands Act, the formation must be an island as defined in Article 10(1) of the 1958 Convention.³ Article 10 provides:

² In this section of the report, the briefs of Alaska and the United States are referred to as AB, USB, ARB, and USB. The corresponding full titles are as follows: Opening Brief of Defendant State of Alaska Following Trial of Question 5 of the Joint Statement of Questions Presented; Post-Trial Memorandum for the United States on Issue 5; Alaska's Reply Brief on Question 5; and Post-Trial Reply Memorandum for the United States on Issue 5.

³ Alaska originally contended that the Convention is not controlling and that the language of the Submerged Lands Act should be applied directly. Joint Statement 14. The State later abandoned this contention. AB 2 & n.1.

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. The territorial sea of an island is measured in accordance with the provisions of these articles.

If Dinkum Sands meets the definition in Article 10(1), then its low-water line will be part of Alaska's baseline under the Convention.⁴ This consequence follows from Article 10(2), just quoted, and Article 3, which states:

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

In the application of Article 10(1), the fundamental disagreement is over whether Dinkum Sands is "above water at high tide." Although other issues have been raised, such as the extent to which Dinkum Sands qualifies as "land" and the extent to which its characteristics must be permanent, these can most readily be treated as questions about aspects of the meaning and application of "above water at high tide."

If Dinkum Sands fails to qualify as an island, it may be only a submerged shoal, or it may be a low-tide elevation—a

⁴ If Dinkum Sands meets the definition in Article 10(1), the island itself (as opposed to the surrounding submerged lands) would be part of the public lands of the United States. Under sections 5 and 6(b) of the Alaska Statehood Act, the United States in general retained its public lands, and Alaska was entitled to select from them lands up to a certain acreage that were "vacant, unappropriated, and unreserved." Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), reprinted as amended in 48 U.S.C. note preceding § 21 (1988). Alaska did attempt to select an area including Dinkum Sands, but its application was rejected on the ground that the area was already reserved. Ak. Exs. 84A-105 to -107; Tr. 1254-57.

feature that Article 11 of the Convention defines in part as "above water at low-tide but submerged at high tide":

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

If Dinkum Sands is either a submerged shoal or a low-tide elevation, the legal consequences are the same. Because it lies more than three miles from the nearest point on the coastline, status as a low-tide elevation would be insufficient to create Submerged Lands Act rights in Alaska. See generally *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 40–47 (1969).⁵ Instead, it would be subject to the jurisdiction and control of the United States under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (1988 & Supp. V 1993).

B. Background of the dispute

The parties have introduced evidence of explorations of the Dinkum Sands area going back to the early nineteenth century. Modern charting of the area, however, may be

⁵ In 1988, the United States extended its territorial sea from a three-mile to a twelve-mile belt. Proclamation No. 5928, 3 C.F.R. 547 (1988), reprinted in 43 U.S.C. § 1331 note (1988). Although Dinkum Sands does lie within the twelve-mile belt, that appears to be immaterial in the present case. See *supra* section II, note 3.

dated to 1949–50, when the Coast and Geodetic Survey conducted a basic hydrographic survey extending from the Return Islands to the McClure Islands (fig. 3.2). U.S. Exs. 84A-224 and -225; Ak. Exs. 84A-201 and -203.⁶ Witnesses for both sides described the survey: for the United States, Mr. James Dailey, a cartographer with the National Ocean Service (the successor agency to the Coast and Geodetic Survey); and for Alaska, Admiral Harley Nygren, who as an ensign had served on the original survey party in 1949 and 1950. See Tr. 496–516 (Dailey), 1319–42 (Nygren).

In August 1949, the survey party encountered a formation that was described as "a new gravel bar baring about three feet." U.S. Ex. 84A-225 and Ak. Ex. 84A-203, at 3; see Tr. 1325–28, 1360–61. The party erected a survey target on the formation, Tr. 1328, 1332–33, 1363, which they named Dinkum Sands. Ak. Ex. 84A-202 (in 1950 addendum, at 4); Tr. 1337–38. Admiral Nygren photographed the formation in late August 1949, when it was an estimated three to four feet above sea level and had an area described as hundreds of yards long and hundreds of feet wide. Ak. Ex. 84A-204; Tr. 1330–32, 1362–63. The official record of the survey, or "smooth sheet," states that Dinkum Sands bares three feet at mean high water. U.S. Ex. 84A-224, Ak. Ex. 84A-201; see

⁶ A basic hydrographic survey, as defined by Shalowitz, "must be so complete and thorough that it does not need to be supplemented by other surveys, and it must be adequate to supersede, for charting purposes, all prior hydrographic surveys of the area. It must be adequately controlled by the best practicable means in current use; it must be sufficiently intense to discover and determine the least depths on all dangers to navigation; it must verify or disprove all dangers, critical depths, and other important features appearing on the charts or prior surveys; it must develop significant submarine features that may be useful to the navigator; and it must provide sufficient permanent control so that future revision surveys will require the establishment of a minimum of additional control." 2 Aaron L. Shalowitz, *Shore and Sea Boundaries* 240 (U.S. Dep't of Commerce Pub. 10-1, 1964). See also Tr. 594–97.

Tr. 499-500, 1329-31. See also 2 Shalowitz, *supra* note 6, at 87, 238 (describing smooth sheets).

Based on the survey of 1949-50, Coast and Geodetic Survey maps from the early 1950s show Dinkum Sands as an island. E.g., Ak. Ex. 84A-327; U.S. Ex. 84A-238. In 1955, however, an inspection of aids to navigation along the Arctic Coast was carried out by a Navy ship, the USS *Merrick*. The *Merrick* reported that Dinkum Sands and the survey target were "not there." U.S. Ex. 84A-241 and Ak. Ex. 84A-330(a), at 9.⁷ Accordingly, the Coast and Geodetic Survey revised its charts. Beginning with the second edition of charts 9472 and 9473 in April 1956, Dinkum Sands was shown as a low-tide elevation, indicating a navigational hazard that might not be visible to mariners. See U.S. Exs. 84A-242 and -243; Ak. Exs. 84A-332 and -333.

The next development came in 1970 as an action of the Baseline Committee, an interagency group charged with delimiting the United States' coastline and its territorial sea.⁸ Dinkum Sands was still charted as a low-tide elevation. However, Admiral Nygren, who was a member of the committee, recalled it as an island in 1949, Tr. 1369-73, and the committee apparently accepted his description, notwithstanding the *Merrick*'s report from 1955. Hence the committee approved a delimitation showing a three-mile belt of territorial sea around Dinkum Sands. Ak. Exs. 84A-205 and -210. See Tr. 1342-50, 1368-75; Ak. Ex. 84A-207.⁹

The delimitation became critical early in 1979, when federal and state officials recommended approval of a leasing

⁷ Alaska challenges the accuracy of this report on the basis of the *Merrick*'s log. See *infra* section D(1).

⁸ See *supra* section III at 166.

⁹ In 1983, after the joint monitoring project described below, the Baseline Committee changed its delimitation to show Dinkum Sands without a three-mile belt. See Ak. Exs. 84A-208, -209, -301; U.S. Ex. 84A-252.

map for a joint oil and gas lease sale in the Prudhoe Bay area. Ak. Ex. 84A-102. This map, which followed the Baseline Committee's approach, Tr. 1303, assigned ownership of the territory around Dinkum Sands to Alaska. The treatment was noticed by Dr. Erk Reimnitz, a marine geologist and Arctic expert with the United States Geological Survey, as he was reviewing an environmental impact statement concerning the lease sale. Tr. 919, 929-30, 1031. Dr. Reimnitz wrote in May 1979 to the Bureau of Land Management that the leasing map was based on old information and that "we have not seen Dinkum Sands exposed above water during the last 4 years." U.S. Ex. 84A-502; also in Ak. Ex. 84A-104. In response, in June 1979, the BLM informed the Alaska Department of Natural Resources that BLM proposed not to measure a three-mile belt from Dinkum Sands for purposes of leasing. Ak. Ex. 84A-103; Tr. 670, 672, 1250-51.

Several Alaskan officials visited the site on July 11, 1979, and found Dinkum Sands 3.5 to 4 feet above water. Ak. Exs. 84A-109 to -115. See also Tr. 1258-60 (2.5 to 5 feet above water), 1286-87. Both federal and state officials made later visits during the summer, finding the formation sometimes above water and sometimes below. See section D(2) *infra*.

Recognizing the difficulty of determining whether Dinkum Sands was an island, the parties commissioned a jointly funded study to determine the formation's height relative to mean high water. Tr. 672-77, 1272-75, 1708-12. The study was budgeted for more than \$2.5 million. Tr. 677. As one part of the study, the parties hired a private contractor to survey Dinkum Sands, and this surveyor took topographical profiles of the feature in March, June, and August of 1981. U.S. Exs. 84A-302 to -304. For the other part, which was to determine the mean high water level, the parties contracted with the National Ocean Survey (now the National Ocean Service), which installed tide gauges and took tidal measurements in 1980 and 1981. U.S. Ex. 84A-400. The outcome

of this two-part "joint monitoring project" will be examined in detail in section E.

C. The high water datum

1. Interpretation of "high tide" as mean high water

Article 10 of the 1958 Convention defines islands as "above water at high tide," but it does not define high tide. Although various definitions could be offered, the parties agree that, under well-established United States practice, "high tide" is to be understood as "mean high water." See USB 30-31; AB 63; Tr. 3362, 3404, 3406. For example, in *United States v. California*, which first applied the Convention in a Submerged Lands Act case, the decree provided:

As used herein . . . "[i]sland" means a naturally-formed area of land surrounded by water, which is above the level of mean high water.

382 U.S. 448, 449 (1966).

The Court has also used mean high water to define the limits of a federal patent of land bordering the ocean. In *Borax Consolidated v. Los Angeles*, 296 U.S. 10 (1935), reprinted in 2 Shalowitz, *supra* note 6, at 646, the Court found that under the common law the boundary was at "the line of ordinary high-water mark." *Id.* at 23. Then it examined the meaning of that term, and it gave some necessary scientific background:

The range of the tide at any given place varies from day to day, and the question is, how is the line of "ordinary" high water to be determined? The range of the tide at times of new moon and full moon "is greater than the average," as "high water then rises higher and low water falls lower than usual." The tides at such times are called "spring tides." When the moon is in its first and third quarters, "the tide does not rise as high nor fall as low as

on the average." At such times the tides are known as "neap tides." "Tidal Datum Planes," U.S. Coast and Geodetic Survey, Special Publication No. 135, p. 3 [1927].

....
In determining the limit of the federal grant, we perceive no justification for taking neap high tides, or the mean of those tides, as the boundary between upland and tideland, and for thus excluding from the shore the land which is actually covered by the tides most of the time. In order to include the land that is thus covered, it is necessary to take the mean high tide line which . . . is neither the spring tide nor the neap tide, but a mean of all the high tides.

In view of the definition of the mean high tide, as given by the United States Coast and Geodetic Survey, that "Mean high water at any place is the average height of all the high waters at that place over a considerable period of time," and the further observation that "from theoretical considerations of an astronomical character" there should be "a periodic variation in the rise of the water above sea level having a period of 18.6 years," the Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands, such as those here in question appear to be, "an average of 18.6 years should be determined as near as possible." We find no error in that instruction.

296 U.S. at 23, 26-27 (footnotes omitted). See also 1 Shalowitz, *supra* note 6, at 84-97 (1962) (giving background on the tide and commenting on the *Borax* case); H.A. Marmer, *Tidal Datum Planes* (U.S. Dep't of Commerce, Special Pub. No. 135, rev. ed. 1951) (U.S. Ex. 84A-404).

As the Court indicated, the tide varies with the phase of

the moon and other astronomical forces. Shalowitz explains that 19 years represent a full tidal cycle:

Although tidal constants and tidal datum planes may be established (within certain limits of accuracy) from observations extending over a month or a year, for the demarcation of valuable tidelands or for scientific purposes continuous observations extending over a period of 19 years are required. This period is generally reckoned as constituting a full tidal cycle because the more important of the periodic tidal variations due to astronomic causes will have gone through complete cycles, and because the variations of a nonperiodic character resulting from mete[o]rological causes may be assumed to balance out during this epoch.⁴⁰ It is therefore customary to regard results derived from 19 years of tide observations as constituting mean values.

⁴⁰ The 19-year cycle reflects the full effect on the time and range of the tide due to the variation in the longitude of the moon's node which has a period of 18.6 years.

2 Shalowitz, *supra* note 6, at 58–59. Given that “high water” is “the maximum height reached by each rising tide” (Marmer, *supra* page 235, at 1), mean high water is then defined as the average height of the high waters over a 19-year period. Marmer at 86; 2 Shalowitz at 66. The rounding up from 18.6 years to 19 years prevents seasonal fluctuations within a year from affecting the mean. Tr. 801–02.

2. Conditions in the Beaufort Sea

The range of tide in the Beaufort Sea is about 6 inches, very small in comparison to most lower-latitude tides. Tr. 781, 852–54, 1967–68, 2008.¹⁰ Besides the variation in the

¹⁰ The range of tide, variable from day to day, is defined as “[t]he difference in height between a high water and a preceding or succeeding low

water level due to astronomical factors, however, there is also considerable variation due to meteorological factors. Tr. 772–74, 951–54, 1970–71, 2014, 2285–87; Ak. Ex. 84A-607. Nautical charts of the Dinkum Sands area carry the following legends:

TIDES: The periodic tide has a mean range of about one-half foot.

CAUTION: Mariners are advised that in the shallow waters of the Beaufort Sea, water levels are strongly influenced by meteorological conditions. Strong offshore winds can produce water depths up to 0.8 meters (2.6 feet) less than those shown on this chart.

E.g., NOS Chart 16061 (6th ed. 1983) (U.S. Ex. 84A-252; Ak. Ex. 84A-301). Shalowitz states the relationship between tide and weather in terms of the concept of sea level:

Mean sea level at any place is the mean level of the sea at that place. It is the primary tidal datum plane and may be defined as the average height of the surface of the sea for all stages of the tide for a 19-year period, usually determined from hourly height readings. Sea level is the level of the sea from which the tide rises and falls, that is, it is the level of the sea freed from the rise and fall of the tide. Or stating this in another way, the daily rise and fall of the tide, which is of astronomic origin, is superimposed upon the daily variation in sea level brought about primarily by changing meteorological conditions.

2 Shalowitz, *supra* note 6, at 62–63 (footnote omitted).

The evidence indicates that, in the Beaufort Sea, much of the variation in sea level is seasonal. During the open water season, about July through September, sea level may be as

water.” Marmer, *supra* page 235, at 1. For comparison, the average range of tide at Boston is 9.4 feet; in Los Angeles Harbor, 3.8 feet; and at Seattle, 7.6 feet. *Id.* at 6.

much as 1 to 1.5 foot higher than the lowest levels of the year. See figure 5.1; Ak. Ex. 84A-802 (showing monthly mean sea level in the Beaufort Sea for several different locations and years); Tr. 1971-78, 1981-82, 2020-23.¹¹ The factors accounting for these changes include wind patterns, barometric pressure, and the expansion of sea water as its temperature rises. Tr. 773, 951-54, 1959-60, 2017, 2033. As to wind patterns, the evidence was that winds from the west, tending to raise the water level, occur mainly in September, whereas winds from the east prevail during the summer and tend to lower the water level. Tr. 951-52, 1803-04, 1868-69. See also Tr. 466-67, 479. In addition to the seasonal changes, there also appears to be considerable variation in sea level from one year to another, so that averages for corresponding months of different years may differ significantly. See Ak. Exs. 84A-702, -803; Tr. 1982-86, 2008, 2070-71.

Apart from any year-to-year differences in the level of the Beaufort Sea, it seems clear that season-to-season changes are much greater than the changes twice daily between high and low tide. As a result, a formation could be regularly above the high tides of the day during some parts of the year and regularly below the high tides of the day during other parts. Indeed, it could sometimes be exposed at all stages of the tide and at other times submerged at all stages of the tide. Neither condition is enough to establish whether the feature

¹¹ In figure 5.1 and Ak. Ex. 84A-802, the means have been calculated month by month but have not been combined into a single figure representing the mean over a whole year or period of years.

The seasonal variation in the Beaufort Sea appears to be comparable to that of lower latitudes. See Marmer, *supra* page 235, at 50-58, which examines the coasts of the conterminous United States and the Pacific coast of Alaska. Marmer finds that monthly sea level is "subject to an annual variation with a range up to a foot," *id.* at 58. The variation in monthly high water levels during the year is similar. *Id.* at 83.

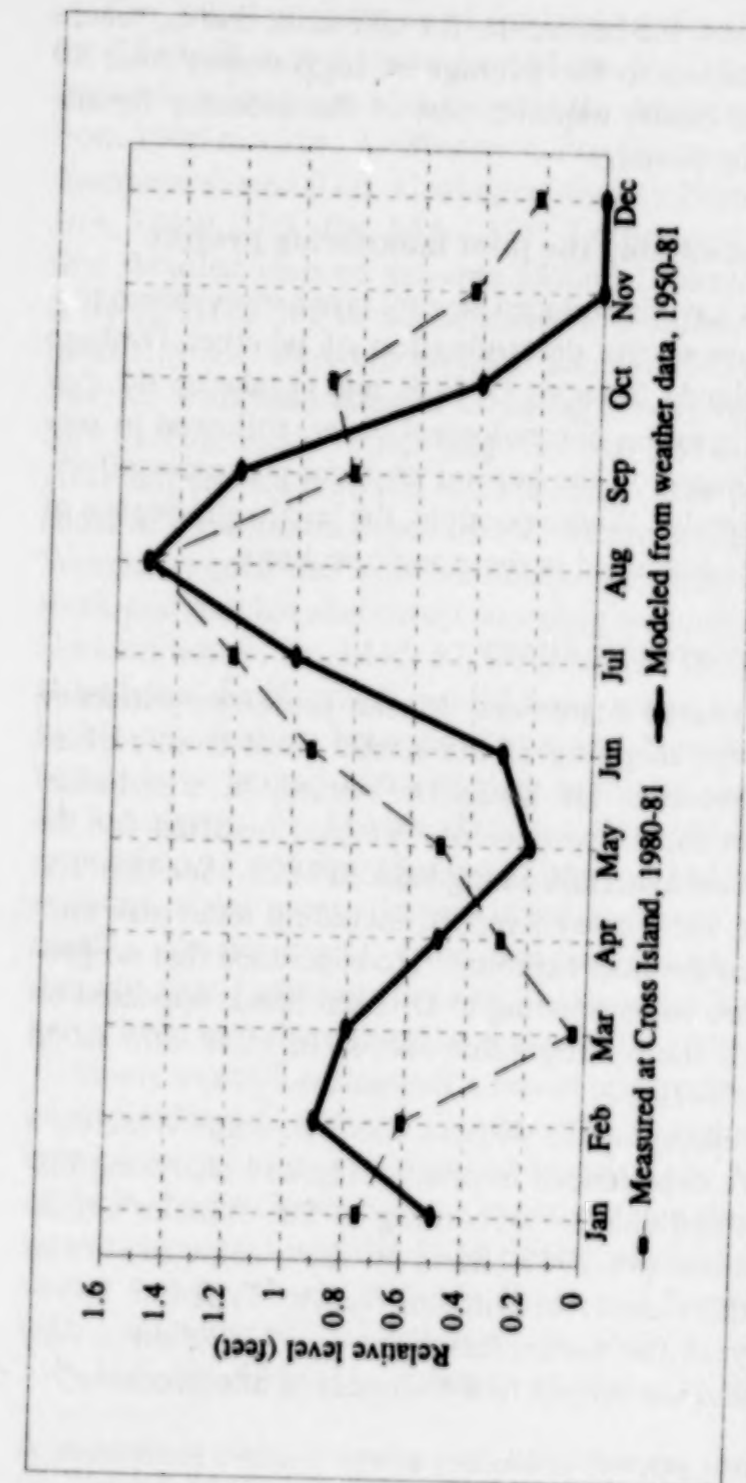


Figure 5.1. Seasonal variation in sea level (adapted from Ak. Ex. 84A-802). Data on average sea level, by month, from measurements at Cross Island in 1980-81 (broken line) and from a model based on weather data for 1950-81 (solid line). The lowest level from either source was given an arbitrary height of zero feet. The highest level is about 1.5 foot above the lowest.

is above or below the borderline for an island, that is, where it lies with respect to the average of high waters over 19 years. This difficulty explains part of the necessity for the joint monitoring project.

D. Evidence predating the joint monitoring project

The parties have introduced several types of evidence that may contribute to the determination of whether Dinkum Sands is an island. Sections D, E, F, and G take up the evidence that falls into a chronological order, followed in section H by evidence on the general physical processes affecting Dinkum Sands. Where possible, the legal significance of the evidence is evaluated in these same sections.

1. *The cartographic history*

Both the United States and Alaska presented extensive evidence on the mapping of the Arctic coast from earliest times to the present. Dr. Louis De Vorsey, Jr., a historical geographer at the University of Georgia, testified for the United States on materials dating back to 1823. *See* U.S. Ex. 84A-101 (Dr. De Vorsey's report, including letter-size copies of many of the map exhibits). He concluded that no geographic feature corresponding to Dinkum Sands appeared on any map until the hydrographic survey of 1949-50. *Id.* at 14-15; Tr. 373-75.

Alaska's cartographic witness was Mr. John Winzler, a civil engineer experienced in researching and analyzing historical maps and charts. According to Mr. Winzler's testimony, numerous pre-1949 charts do show some feature or features in the vicinity of Dinkum Sands. Tr. 1405, 1554-55.¹² Many of the earlier maps, however, are on a very small scale and are subject to differences in interpretation.

¹² *See* Ak. Ex. 84A-343 (a summary of Mr. Winzler's presentation, to be used as an overlay on the current charts in Ak. Ex. 84A-301). *See also*

The fullest exploration of the Dinkum Sands area, prior to the 1949-50 survey, was carried out by Ernest de K. Leffingwell, a geologist who traveled the Arctic coast of Alaska from 1906 to 1914. Leffingwell, *The Canning River Region, Northern Alaska* (U.S. Geological Survey Professional Paper 109, 1919) (U.S. Ex. 84A-135). Leffingwell produced the first detailed map of the area around Dinkum Sands, on a scale of 1:125,000 or about 1 inch to 2 miles. *Id.*, plate IV (also U.S. Ex. 84A-115 and Ak. Ex. 84A-313); Tr. 361-62. Several witnesses attested to the generally high quality of Mr. Leffingwell's work. E.g., Tr. 448, 574-76, 1073-74. His chart shows, between Narwhal and Cross Islands, only a shoal at a minimum depth of 2.25 fathoms (13.5 feet). Mr. Winzler argued that poor visibility hampered Leffingwell's work and that his shallowest sounding was not necessarily at Dinkum Sands, Tr. 1445-53, whereas Dr. De Vorsey maintained that Leffingwell would have made every effort to locate any feature between Cross and Narwhal because it would have helped him establish mutually visible beacons for his survey. Tr. 364-65; U.S. Ex. 84A-135 at 15 ("It was impossible . . . to carry the line of beacons to Cross Island on account of its great distance from the next island to the east"). Dr. Reimnitz, from the Geological Survey, also thought that Leffingwell would have seen Dinkum Sands had it been anywhere near the surface. Tr. 1043.

In any event, Leffingwell's report apparently became the basis for later Coast and Geodetic Survey charting of the area between Cross and Narwhal Islands. Mr. James Dailey of the National Ocean Service explained that the 1919 report was incorporated into the 1928 edition of chart 9400, which shows a stippled area between Cross and Narwhal, marked with a sounding of 2.25 fathoms. Tr. 564-65; Ak. Ex. 84A-319; U.S. Ex. 84A-211. Editions up through 1950 are simi-

the appendix to Alaska's opening brief, which contains an extremely useful, though incomplete, summary of both parties' cartographic evidence.

lar. U.S. Exs. 84A-120 to -123, -212 to -216. Although there was some disagreement over the interpretation of these charts,¹³ Alaska acknowledges that the maps prior to the 1949-50 survey are inconclusive as to whether the features shown are islands, low-tide elevations, or submerged shoals. Tr. 3424, 3448.

The 1949-50 hydrographic survey, which found Dinkum Sands 3 feet above mean high water, was described *supra* pages 231-32. The United States does not dispute the accuracy of the survey. USRB 7-8. Following the survey, Dinkum Sands was charted as an island in the early 1950s. U.S. Exs. 84A-224, -235, -236, -238, -239; Ak. Exs. 84A-201, -324, -325, -327, -328; *see* Tr. 510-15, 1514-18, 1611-12.

Two later reports formed the basis for the subsequent mapping of Dinkum Sands as a low-tide elevation. In 1955, as already noted, the USS *Merrick* reported that the island and survey target were "not there." *See supra* page 232; Tr. 516-20, 610-20, 1520-21. Alaska raised doubts about the *Merrick*'s report, arguing from the ship's log for August 17 and 18, 1955, that observations were impeded by dangerous ice conditions and a strong southwest wind (tending to raise the sea level significantly). Mr. Winzler also reconstructed the *Merrick*'s course, finding that its nearest distance from Dinkum Sands was just under three nautical miles. Ak. Ex. 84A-330(b) and (c); Tr. 1521-40, 1666-67, 1691-1700. On the other hand, the *Merrick*'s report stated that comments about aids to navigation had been made "only when the aid was definitely sighted or definitely absent. When visibility or the distance of the ship from shore prevented certain

¹³ Dr. De Vorsey said that stippling indicated a shoal. Tr. 359, 398-99, 415-16. Mr. Winzler, on the other hand, interpreted the feature on the 1928 chart as above water and the placement of the sounding only a matter of cartographic convenience. Tr. 1498-99, 1602-03. He also noted that earlier charts had shown Narwhal, Cross, and other islands with similar stippling. Tr. 1653.

knowledge of the condition of the aid, no comment was made." U.S. Ex. 84A-241 and Ak. Ex. 84A-330(a), enclosure 2, at 1; Tr. 518, 614. The United States also brought out that two small boats from the *Merrick* went within two miles of the charted location of Dinkum Sands. These boats were sent to help another ship, the USS *Archer T. Gammon*, that had become grounded on a shoal. Tr. 1697-1700.

In 1976, another report resulted from a joint project of the Coast Guard and the National Ocean Survey, one of whose purposes was "[t]o investigate all charted landmarks" along the Alaskan Arctic coast. U.S. Ex. 84A-246. The investigation was done by 300-foot helicopter flights, covering the Dinkum Sands area in mid-August 1976. *Id.* Commander Ned Austin of the NOS reported of Dinkum Sands, "Couldn't find island." *Id.*; Tr. 533-35, 588, 1546-47.

It was on the basis of the *Merrick*'s report, and later that of Commander Austin, that the Coast and Geodetic Survey changed its charts, conservatively, to show Dinkum Sands as a low-tide elevation.¹⁴ As Alaska argues, the reports may be less than conclusive as to the actual status of Dinkum Sands in 1955 and 1976. Still they do suggest a considerable change in the feature from the time Admiral Nygren photographed it at an estimated 3 to 4 feet above water level in August 1949 (Ak. Ex. 84A-204).

Some later maps prepared by the United States Geological Survey and the Army Map Service do show Dinkum Sands as an island.¹⁵ Oddly, most of these maps purport to

¹⁴ *See* U.S. Exs. 84A-238, -239, -242 to -245, -247 to -252 (editions from 1955 to 1983 of charts 9472 and 9473, later numbered 16061 and 16046 respectively); Tr. 524, 620-25, 662-64, 1542-43. The charts also show where the *Gammon* was grounded in 1955, less than two miles from Dinkum Sands.

¹⁵ U.S. Ex. 84A-136 (1955); Ak. Ex. 84A-331 and U.S. Ex. 84A-700 (1955, revised 1977); Ak. Ex. 84A-334 (1958); U.S. Ex. 84A-132 and Ak. Ex. 84A-340 (1960, revised 1976); U.S. Ex. 84A-130 (1962).

be derived in part from the 1956 editions of charts 9472 and 9473, which showed Dinkum Sands as a low-tide elevation. The record discloses no other basis for their depiction of Dinkum Sands, *see* Tr. 1633-42, and neither party has attached much weight to it.

Alaska seems to attach significance to the facts that the Baseline Committee, beginning in 1970, delimited the territorial sea around Dinkum Sands as if it were an island and that the initial 1979 leasing map also showed a three-mile belt around Dinkum Sands as Alaskan waters. AB 107-08; ARB 52-53; *but see* Tr. 3427-28. Again, the factual basis for these maps was only that already described. *See supra* page 232. The drawing of the three-mile belt adds no further weight. As Alaska recognizes, Tr. 3412, the nautical charts showing this delimitation were inconsistent with the Convention, for they depicted Dinkum Sands as a low-tide elevation outside the three-mile limit of any other feature but with a territorial sea of its own. The initial leasing map simply followed the nautical charts.

In sum, although Dinkum Sands was concededly above mean high water at the time of the 1949-50 survey, USRB 7-8, the factual evidence underlying the cartographic record contains nothing to show that Dinkum Sands continued at that elevation in later years and some evidence that it was below water in 1955 and in 1976. The maps themselves (as distinguished from the underlying evidence) contribute nothing more.

2. Other observations

Besides evidence related to the mapping of Dinkum Sands, the record contains numerous reports of other observations in the area. Among these are descriptions given by Inupiat who live on the North Slope and are familiar with the sea around Cross and Narwhal Islands. One witness was

Mr. Thomas Napageak, a subsistence hunter who has traveled there as a whaling captain since 1972, usually for about four weeks in August and September. Tr. 474-76, 486-87. Mr. Napageak stated that he has regularly encountered a formation in the approximate location of Dinkum Sands, but he made clear that it is under water and cannot always be detected from a boat. Tr. 477-78, 485. Another witness, Mr. Horace Ahsogeak, remembered traveling in the vicinity many times, mentioning an occasion in 1938 in particular, and he testified that he had not seen an island or shoal between Cross Island and McClure [Narwhal] Island. Tr. 464-68; *see* Tr. 668.

Also entered into evidence, by agreement of counsel, were several transcripts of interviews with Inupiat. Ak. Exs. 84A-17 to -19; Inupiat Interveners' Exs. 1 and 2; Tr. 665-68, 1390. Alaska calls attention to the interview with Mr. Andrew Oenga, who recalled camping on a sand bar in the area of Dinkum Sands in the late spring of 1934, while the ice was still secure enough for a dog team and sled. Ak. Ex. 84A-17 at 1-2; *see* Tr. 396, 424. At other times, however, Mr. Oenga said the feature "would surface up in low tide and then it would be gone on high tide." Ak. Ex. 84A-17 at 2.

Other observations of Dinkum Sands were reported by the United States' expert on the Arctic, Dr. Reimnitz. Before the present dispute arose, Dr. Reimnitz had visited the area each year from 1970 to 1973 and from 1975 to 1978. The 1970 visit took place in June; the others, in August and September. Each visit included observations on from two to seven separate days. During these times, Dr. Reimnitz had seen Dinkum Sands above water only once, on August 17, 1972. It was submerged again on August 18, 22, and 23. *See* U.S. Exs. 84A-301, -503; Tr. 914, 921-29, 1050-51.

The following table summarizes Dr. Reimnitz's observations of Dinkum Sands as above or below water. It also in-

cludes visits by various witnesses in 1979 and 1980, to be described in the paragraphs below.

**Height of Dinkum Sands Compared to Water Level
at Time of Observation**

	June	July	August	September
1970	below	—	—	—
1971	—	—	—	below
1972	—	—	mixed	—
1973	—	—	below	—
1975	—	—	—	below
1976	—	—	below	below
1977	—	—	below	below
1978	—	—	—	below
1979	—	mixed	mixed	above
1980	mixed	mixed	below	below

Note: The term "mixed" means that Dinkum Sands was observed both above water and below water during the same month.

Observations alone, of course, are not enough to say where Dinkum Sands lies with respect to mean high water. Beginning in 1979, when the present dispute arose, there were not only more frequent observations but also some attempts to judge the water level at the time.

During the summer of 1979, Dinkum Sands was seen both above and below water.¹⁶ It was highest when Alaskan officials made their first visit, on July 11. At this time sev-

¹⁶ U.S. Exs. 84A-301, -504, -507a, -507b, -512; Ak. Exs. 84A-109 to -122; Tr. 920, 930-34, 937-39, 941-42, 945-46, 949, 955-57, 1048, 1056-58, 1081-83, 1258-72, 1286-97, 1301, 1303-06, 1307-08.

eral small gravelly mounds were exposed, spaced over a distance of about 1000 to 2000 feet. The largest was 3.5 to 4 feet above water by one estimate, 2.5 to 5 feet above water by another. Ak. Ex. 84A-109 (photograph); Ak. Ex. 84A-110; Tr. 1259-60. Dinkum Sands was seen above water again intermittently until September.

Dinkum Sands was at its lowest during 1979, compared to the water level at the time, on July 25. See U.S. Exs. 84A-301, -504, -507a (photograph); Tr. 933-34, 937-39, 941-42, 945-46, 955-57, 1048, 1056-58. On that day, Dr. Reimnitz conducted a survey in which he found the highest spot to be 30 to 40 centimeters (1.0 to 1.3 foot) under water. U.S. Ex. 84A-504 at 4. According to a tide station some fifteen miles away, at Prudhoe Bay, the water level was then about 20 centimeters (0.66 foot) above mean high water.¹⁷ If the Prudhoe Bay reading were known to be applicable, this would place Dinkum Sands 10 to 20 centimeters (0.33 to 0.66 foot) below mean high water on July 25, 1979.

In 1980, the gravel surface of Dinkum Sands was seen under water on June 23 and above water on June 30, just before the ice broke up. It continued above water through July 7; it reappeared above water on July 27 and July 30. In between these times, and afterward through September, it was submerged. By early October it was again covered with ice.¹⁸

During 1980, there are no reports in evidence of tide readings from Prudhoe Bay, but there are several estimates

¹⁷ The Prudhoe Bay station showed the water level to be about 35 centimeters (1.15 foot) above mean lower low water. Since the range of tide is about 15 centimeters or 0.5 foot, this was about 20 centimeters (0.66 foot) above mean high water. See U.S. Ex. 84A-504 at 4.

¹⁸ U.S. Exs. 84A-301, -703. See also U.S. Exs. 84A-300, -507c, -507d; Tr. 695-96, 713-14, 720-22, 737-40, 742, 753, 934-37, 939-40, 942-43, 946-48.

of the distance of Dinkum Sands above or below water. The feature was apparently highest on July 2, 1980, when several patches of gravel were exposed with the largest, perhaps 2 feet by 6 feet, about 1 foot above water. U.S. Ex. 84A-703; U.S. Ex. 84A-301; Tr. 737-38. It was deepest on August 31, when Dr. Reimnitz made another survey and found the highest part to be 1 meter (3.28 feet) under water. U.S. Ex. 84A-301; Tr. 934-37, 939-40, 942-43. On September 14 he again measured the crest as 1 meter under water. U.S. Exs. 84A-301, -507c (photograph); Tr. 943, 946-47. The 1-meter depths are too large to account for by seasonal changes in the water level (about 1.5 feet) and by the range of tide (about 0.5 foot). There was no evidence of unusual weather conditions that would raise the water level. Accordingly, the 1980 reports tend to suggest, as did those for 1979, that Dinkum Sands is not consistently above mean high water.

E. The joint monitoring project

The joint monitoring project had two parts, as mentioned in section B: to determine the level of mean high water at Dinkum Sands, and to determine the elevation of Dinkum Sands itself. According to the report tying the results together, Dinkum Sands was below mean high water on each of the three occasions when it was surveyed in 1981. U.S. Ex. 84A-302, map 6.¹⁹

Alaska accepts the project findings about the elevation of Dinkum Sands, but it contests the findings as to the tidal datum. AB 73-74. In Alaska's view, the appropriate corrections would lower the mean high water level and would

¹⁹ The report included information developed by the contractors for both parts of the project. It was prepared by Alaskan officials and included comments by United States project inspectors. See U.S. Ex. 84A-302; Tr. 678-79, 702-03, 731-32, 782, 788-89, 1716-17.

show that Dinkum Sands was above mean high water at two of the three 1981 surveys. Alaska also contests the precision claimed for the finding of mean high water.

The United States accepts the project findings about mean high water, USB 71-72, but it disagrees with the findings about the elevation of Dinkum Sands. The United States would reduce the elevations found by two of the three surveys, bringing Dinkum Sands even farther below the level of mean high water.

I begin by reviewing the findings and how they were arrived at. The United States' objections are taken up in sections E(2) and F; Alaska's objections, in section E(3).

1. Determination of mean high water

The tidal datum part of the project was carried out by the National Ocean Service, acting as an independent contractor in consultation with representatives of both parties. See generally Tr. 672-78, 700-02, 756-60, 787-88, 1272-75, 1709-12; U.S. Exs. 84A-401 and -402; Ak. Exs. 84A-3 to -6. The collection of data for NOS analysis was subcontracted to Dr. Robert Lewellen, an earth scientist with Lewellen Arctic Research, who testified as an expert witness for Alaska. Tr. 701, 1274, 1796-98.

Although the datum would ideally have been computed from 19 years of tide readings, no American tide station in the Arctic had such a long series of data. Tr. 802. NOS represented that, with a year's readings, it could calculate the datum to an accuracy of plus or minus 3 inches. Tr. 675; see also Tr. 1274, 1711-12. Mainly to ensure that a full year of data would be available, five tide stations were originally proposed, with four to operate all year and one during the ice-free period. Tr. 758-60. After a station at Narwhal Island was destroyed by ice in September 1980, NOS said that the same accuracy could be achieved with one year of data

from Cross Island and three months from Dinkum Sands. Tr. 676; Ak. Ex. 84A-6, at 3.

Ultimately the project collected 17 station-months of data: 12 months from Cross Island, 4 months from Dinkum Sands, and 1 month from Narwhal Island. U.S. Ex. 84A-400, at 4. Beginning from readings taken every 6 minutes, *id.* at 2, NOS computed monthly averages of the high tide readings at Cross Island and averaged the monthly figures to find mean high tide for the year. *Id.* at 6-9; Tr. 769, 775-76, 830-31.²⁰ Using this figure as a surrogate for the 19-year average at Cross, NOS then arrived at a corresponding figure for Dinkum Sands by comparing the four months of simultaneous observations from the two stations. U.S. Ex. 84A-400 at 9; Tr. 777-79, 832.

The remaining question was how close these estimates of mean high water were to the values that would have been derived from a full 19 years of information. To reach an answer, NOS compared data from other tide stations—elsewhere in Alaska and in the Canadian Arctic—where longer data series were available. After extensive statistical analysis, it concluded that the value that would have been computed with 19 years of data was, with 95% probability, within plus or minus 0.206 foot (2.47 inches) of the value derived from one year of data. Tr. 875; *see* U.S. Ex. 84A-403; Tr. 857-79. That is, according to NOS, the true value of mean high water was almost certainly within about 2.5 inches of the estimate. Furthermore, according to NOS, there was a 68% probability that the true value was within half that distance from the estimate—within plus or minus 0.103 foot (1.24 inches). *See* Tr. 864, 868-69, 874-75.²¹

²⁰ As a possible alternative to this averaging, NOS considered using another method known as correction by tabular values. The two methods yielded very similar results. U.S. Ex. 84A-400 at 6-8; Tr. 776, 780-81.

²¹ The range within which the true value of mean high water is likely to lie, with some specific probability (or "confidence level"), has been

Before the level of mean high water could be compared with the elevation of Dinkum Sands, it was necessary to provide a common reference point. This purpose was served by a benchmark set at Dinkum Sands, which was given an assumed elevation of 50 feet. U.S. Ex. 84A-302, at 3. On that vertical scale, the value of mean high water was computed to be 51.88 feet. It is so shown on graphs reporting the final results of the joint project. U.S. Exs. 84A-302 to -304.

After the graphs were prepared, however, the NOS made a further review of its work and revised the estimate downward by 0.04 foot (about half an inch). The adjustments, which stemmed from problems with a tide gauge and a computer program, are not disputed. *See* Tr. 783-86, 791, 814-15; Ak. Exs. 84A-9, -10, -14; AB 77-78.

Accordingly, the value of mean high water estimated by NOS is 51.84 feet. By NOS's calculations, there is a 95% probability or confidence level that the true value of mean high water is within plus or minus 0.206 foot of the estimate. The true value would thus fall between 51.634 to 52.046 feet. These numbers are shown in figure 5.2.

referred to as the error band. *E.g.*, USB 64. The calculated error band was based on a common statistical measure, the standard deviation. If x is the estimated value for mean high water, the standard deviation is 0.103 foot, and the data follow a normal distribution, then the probabilities as to the true value of mean high water are as follows:

True value of mean high water, in feet	Probability
more than $x + .206$	2.5%
$x + .206$ to $x + .103$	13.5%
$x + .103$ to $x - .103$	68.0%
$x - .103$ to $x - .206$	13.5%
less than $x - .206$	2.5%

See, e.g., Michael O. Finkelstein & Bruce Levin, *Statistics for Lawyers* 118, 540 (1990).

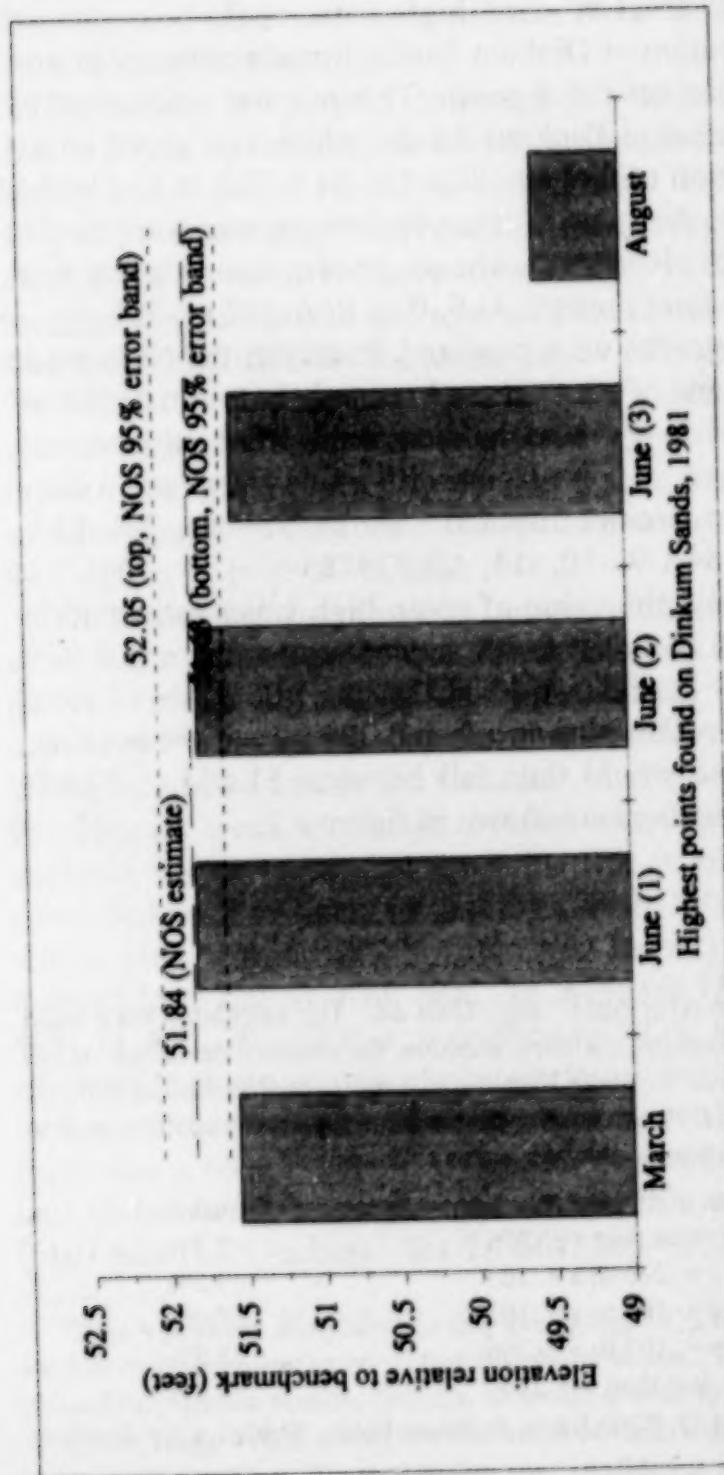


Figure 5.2. NOS estimates of mean high water and error band compared to 1981 measurements of Dinkum Sands. By the NOS estimate, at a 95% confidence level, mean high water lies a 51.84 feet plus or minus 0.206 foot. Of the 1981 measurements of the elevation of Dinkum Sands, all were below 51.84 feet, and only two were within the error band. All elevations are given relative to a benchmark with an assumed height of 50 feet.

2. Determination of the height of Dinkum Sands

The difficulty in determining whether Dinkum Sands lies above mean high water does not lie only in the measurement of the tidal datum. The joint monitoring project showed, as earlier observations also suggested, that the formation itself changes in elevation.

For the joint monitoring project, the task of surveying Dinkum Sands was contracted to F.M. Lindsey & Associates, an Anchorage surveying firm, with project inspectors appointed by both Alaska and the United States and with Dr. Lewellen as scientific coordinator.²² The surveyors measured the height of the formation three times: in March, June, and August 1981. Each survey was done under different conditions. Figure 5.2 summarizes the results.

In March, Dinkum Sands was under the winter ice pack. The surveyors covered the feature with a grid roughly half a mile long and 200 feet wide. At regular intervals on the grid, they drilled through the ice until reaching gravel and then measured the elevation of the gravel surface. About 270 holes were drilled altogether. The three apparent highest sites were also excavated for examination of the ice and soil content. Relative to the benchmark with an assumed height of 50 feet, the highest point found during the March survey measured 51.56 feet, or 0.28 foot below mean high water as later found by NOS (51.84 feet). See U.S. Ex. 84A-302 at 3; U.S. Exs. 84A-303 and -304; Tr. 679-89, 702-09, 1716-17.

The second survey was done on June 25, 1981, while the ice was melting and about to break up for the season. There

²² The same surveying firm, under contract to Alaska only, carried out a first topographical survey of Dinkum Sands in the spring of 1980. The 1980 profile, however, was not related to a tidal datum and so has not been relied on by either Alaska or the United States. See U.S. Ex. 84A-302 at 1-3; Tr. 1708-09, 1748.

were visible areas of gravel, and elevations were taken from the five highest such areas. The three highest readings were 51.82, 51.80, and 51.56 feet; the first two are barely below the NOS figure of 51.84 feet for mean high water. See U.S. Ex. 84A-302 at 4; U.S. Ex. 84A-304; Tr. 688-93, 709-12, 723, 724, 1718-21, 1750-51.²³

The third survey, on August 14, 1981, took place during the open water season. The entire formation was submerged. One measurement was taken from its apparent highest point, which was about 2.90 feet under water. On the scale used for previous surveys it measured about 49.57 feet, or 2.27 feet below the NOS figure for mean high water. See U.S. Ex. 84A-302 at 4-5; U.S. Ex. 84A-304; Tr. 731-37, 741-52, 1721-22, 1765.²⁴

In summary, the elevations all fall short of the NOS figure for mean high water, 51.84 feet. Although the two highest points in the June survey are very close, the others do not even reach the 95% error band defined by NOS, which begins from 51.634 feet and goes upward. See figure 5.2.

As the United States argues, it is very doubtful that the two highest measurements in June represent the true height of Dinkum Sands. The United States' witness on the March and June surveys was its project inspector, Mr. Jerry Pinkerton of the Bureau of Land Management. Tr. 677-78. Mr. Pinkerton testified that the two highest measurements in June

²³ Compared to the water level at the time of the June survey, the elevations of these three highest points were reported to be 0.02 foot (0.24 inch) above water, 0.02 foot below water, and 0.24 foot (2.88 inches) below water. U.S. Ex. 84A-302 at 4.

²⁴ The August measurement was reported to be accurate only to within plus or minus 0.20 foot; for it was tied to an observation of the surrounding water level, and a heavy swell was running at the time. U.S. Ex. 84A-302 at 5. This uncertainty is too small to matter, since in any case the high point was more than two feet below the NOS figure for mean high water.

were based on "very small pockets of gravel just setting [sic] on clear ice," Tr. 690, and he thought that they "were gravel that we had shovelled up on top of ice when we were there in March," Tr. 693. See Tr. 690-93, 711. Mr. James Spargo, who was Alaska's project inspector, Tr. 1710-11, agreed it was possible that the pockets of gravel could have resulted from the March excavations. Tr. 1751.

If the small gravel piles were indeed artifacts from the March survey, as seems likely, they should not be treated as contributing to the height of Dinkum Sands. I conclude that little or no weight can be given to the two highest measurements from the June 1981 survey.²⁵

3. Alaska's proposed adjustments to the tidal datum

a. Extent of the adjustments

Alaska contends that the NOS estimate of mean high water is too high and also that the NOS error band is too narrow. It says the correct best estimate of mean high water is at most 51.58 feet, as opposed to the NOS estimate of 51.84 feet. AB 91-93. In addition, Alaska would widen the error band from plus or minus 0.206 foot to plus or minus 0.6 foot. Figure 5.3 shows the proposed adjustments.

Alaska states that, with a value of 51.58 feet for mean high water, Dinkum Sands was above the datum in March and June 1981. AB 91; ARB 63-64. In asserting that the March survey of Dinkum Sands found an elevation higher than 51.58 feet, the State seems to be mistaken. As stated in the last section, the highest point located was 51.56 feet. It is true that, from the bar graphs on which the survey results were reported, the number cannot be read off accurately to

²⁵ Even if the gravel piles were formed naturally, the fact that they occurred on top of clear ice raises a further question. The problem of ice beneath surface gravel is discussed in section F, *infra*.

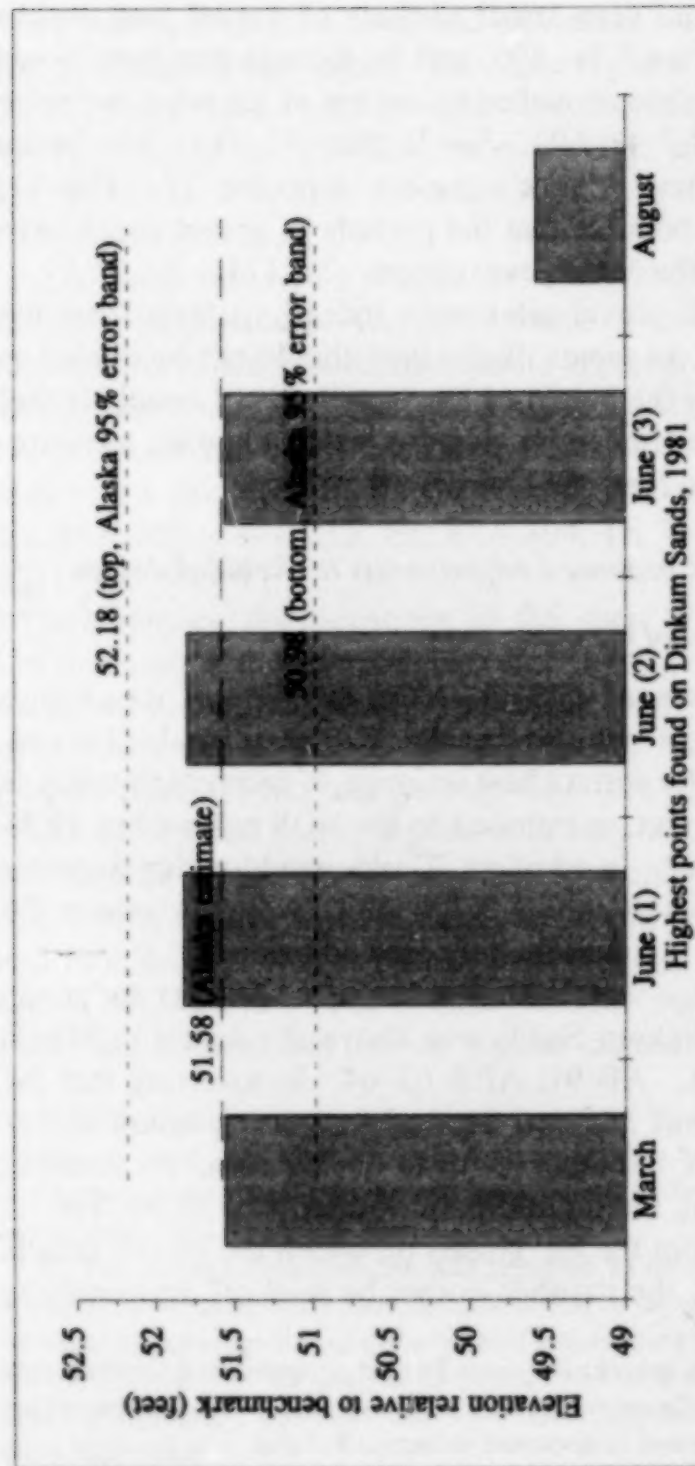


Figure 5.3. Alaska's estimates of mean high water and error band compared to 1981 measurements of Dinkum Sands. By Alaska's estimate, at a 95% confidence level, mean high water lies at 51.58 feet plus or minus 0.6 foot. Of the 1981 measurements of the elevation of Dinkum Sands, two were above 51.58 feet, and two more were within the error band. Elevations are relative to a benchmark with an assumed height of 50 feet.

the nearest hundredth of a foot. For the March survey, however, unlike the others, the highest elevations were also reported in figures. A diagram showing 51.56 feet as the highest March elevation is included on the same sheet as the bar graph. U.S. Ex. 84A-302, map 6; U.S. Ex. 84A-304 (larger scale copy of map 6). See also Tr. 689, 708-09.

For June, the two highest measurements are above Alaska's asserted value for mean high water (51.58), but these measurements are of the two gravel piles probably resulting from the March survey. The third highest June measurement is about the same as in March, 51.56 feet.

In principle, these observations are enough to dispose of the argument that Dinkum Sands was above mean high water during all or even most of the period covered by the 1981 surveys. Even if all of Alaska's proposed adjustments are accepted, so that the best estimate of the datum becomes 51.58 feet, the March and August surveys gave elevations below this number, and even in June the only elevations above 51.58 feet were based on questionable piles of gravel. The situation is summarized in the table on page 258, which brings together the data from figures 5.2 and 5.3.

Although all the uncontested measurements are below both estimates for mean high water, the measured elevations of 51.56 feet are very near Alaska's figure. I therefore do examine the particular adjustments to the tidal datum that Alaska proposes. These may be summarized as follows:

- 51.84 MEAN HIGH WATER (NOS figure)
- 0.20 for trend, to conform to the tidal epoch 1941-59 (or -0.06 to conform to the epoch 1960-78)
- 0.06 for abnormal weather
- 51.58 MEAN HIGH WATER (Alaska's figure)

**Estimates of Mean High Water and Error Band
Compared to 1981 Measurements of Dinkum Sands**

52.18	top of error band, 0.6 above MHW (Alaska's figure)
52.05	top of error band, 0.206 above MHW (NOS figure)
51.84	MEAN HIGH WATER (NOS figure)
51.82	highest measurement in June 1981 (contested)
51.80	second highest measurement in June 1981 (contested)
51.63	bottom of error band, 0.206 below MHW (NOS figure)
51.58	MEAN HIGH WATER (Alaska's figure)
51.56	third highest measurement in June 1981 (uncontested)
51.56	highest measurement in March 1981
50.98	bottom of error band, 0.6 below MHW (Alaska's figure)
49.57	single measurement in August 1981

b. The adjustment for trend

Although mean high water is defined as an average over a 19-year period, 19-year periods are not all alike. The average may differ from one period to another because of slow, long-term changes in the relationship of land and sea. See 2 Shalowitz, *supra* note 6, at 58–59; Marmer, *supra* page 235, at 63–64. Contributing factors may include both changes in the sea level, as by glacial melting, and vertical movements of the land. Tr. 1958, 2026–27; U.S. Ex. 84A-403, at 1.

It is generally accepted that sea level is rising globally at a rate of about 1.5 millimeters (0.005 foot) per year. Tr. 843–44, 1966–67, 2005; 45 Fed. Reg. 70,296, 70,297 (1980) (Ak. Ex. 84A-8).²⁶ Alaska complains that the NOS estimate

²⁶ Alaska introduced evidence of a more recent computation of the rate as 2.3 millimeters (0.0075 foot) per year. Tr. 2054, 2177.

of mean high water failed to take this long-term trend into account. Its argument depends on two points: first, that sea level is in fact rising at Dinkum Sands; and second, that the estimated tidal datum at Dinkum Sands should be adjusted back to an earlier time. A further question, to which I turn first, is the amount of any adjustment.

To make tidal datums comparable throughout the United States, the Federal Government recognizes specific nineteen-year periods as tidal epochs. 2 Shalowitz, *supra* note 6, at 58–59. The epoch in current official use is that from 1960 through 1978. It came into effect on November 28, 1980, replacing the epoch from 1941 through 1959. 45 Fed. Reg. 70,296 (1980) (Ak. Ex. 84A-8). To relate the mean high water figure computed from 1980–81 data to one of these epochs, one would adjust the figure to the midpoint of the epoch (either 1950, as the midpoint of 1941–59, or 1969, as the midpoint of 1960–78). Based on a global trend of a 1.5 millimeter rise in sea level per year, Alaska proposes a correction of –0.2 foot (2.4 inches) to take the mean high water figure back to its 1950 level, or –0.06 foot (0.72 inch) if the 1960–78 epoch is used. AB 83; Ak. Ex. 84A-806; Tr. 2002–07, 2008–09.²⁷

The parties agree that data published after November 28, 1980, would normally be related to the 1960–78 epoch. AB 82; USRB 26–27. Cf. Tr. 3370, 3433 (referring to the time the data were collected). Alaska acknowledges that the NOS figure for mean high water was first published in December 1981. Tr. 811–12; Ak. Exs. 84A-9, -14.²⁸ Accordingly, if

²⁷ The first proposed correction, if calculated more precisely, would be only –0.15 foot. Using the conversion factor of 1 meter = 3.281 feet, the 31-year period from 1950 to 1981 would have an assumed rise in sea level of 46.5 millimeters or .0465 meter or 0.153 foot.

²⁸ The underlying data had been collected at Cross Island from September 1980 through August 1981 and at Dinkum Sands from January 1981 through April 1981. U.S. Ex. 84A-400 at 4.

any adjustment were to be applied for trend, it would be the adjustment of -0.06 foot to conform to the 1960-1978 epoch.²⁹ By rejecting the adjustment of -0.2 foot, this conclusion eliminates the largest part of Alaska's proposed corrections to the tidal datum.

The remaining question is whether even the smaller adjustment of -0.06 foot should be made. NOS found, contrary to Alaska's point that sea level is rising at Dinkum Sands, that the trend in sea level there is unknown. Tr. 880, 893. The United States agreed with this position. USRB 29; Tr. 3366-67, 3453-56. The NOS report on the tidal datum explained:

An extremely important point . . . is that there are no long-term NOS tidal observations in the Beaufort Sea to determine the extent of long-term trends for the area. . . . Spatially, throughout Alaska where long series of observations are available, the long-term trends for sea level fluctuate immensely so it is not possible to make any assumptions about the trend in isolated areas. As an example, Sitka and Juneau are two relatively close NOS control tide stations in southeast Alaska which have extremely different long-term sea level trends. . . . It is obvious that a knowledge of the long-term sea level trend at one station provides no information about the trend at the other, and, in fact, any such assumption could be quite misleading.

²⁹ Alaska has argued for use of the 1941-1959 epoch on the theory that the rights of the parties became fixed, by agreement, at a time when that epoch was in effect. AB 82. As described to the Master, however, the agreement in question covers only "the location of . . . the formation known as Dinkum Sands and the three-mile projections" therefrom. Joint Statement 2. The description in the Joint Statement added: "There is, however, no agreement as to the controlling date or dates for determining whether Dinkum Sands is part of the coast of Alaska and that matter may be disputed." *Id.*

U.S. Ex. 84A-403, at 4. According to the same report, sea level at both Sitka and Juneau was falling, at the respective rates of 0.009 foot per year and 0.045 foot per year. *Id.* at 6. The NOS report indicates that most of the other long-term Alaskan tide stations also show a falling sea level. *Id.* at 5.

Alaska's principal witness on sea-level trend was Dr. Reinhard Flick, an oceanographer with the California Department of Boating and Waterways and the Scripps Institution of Oceanography. Related testimony was given by Dr. Douglas Inman, also an oceanographer at Scripps. Dr. Flick pointed out that the other Alaska tide stations referred to in the NOS report are all located on the Bering Sea or the Gulf of Alaska, in regions that are tectonically active so that the ground there may well be rising. See Tr. 2025-26; 2 Shalowitz, *supra* note 6, at 262 n.81. In contrast, the ground under the Beaufort Sea is tectonically stable. See Tr. 2026, 2246-47, 2252-53; Tr. 3435.

Furthermore, Alaska's witnesses testified, there are other tide stations closer to Dinkum Sands where the sea level is rising rapidly. Tuktoyaktuk, the nearest Canadian station on the coast of the Beaufort Sea, measures a rise in sea level of about 1 centimeter (0.03 foot) per year, more than six times the global rate. Ak. Ex. 84A-806 and -808; Tr. 1987-91. At Prudhoe Bay, where tide data were available for the open-water seasons from 1976 to 1983, sea level has risen by about 2 centimeters (0.07 foot) a year, twice even the rate at Tuktoyaktuk. Ak. Ex. 84A-608, -806, -807; Tr. 1995-99; Tr. [16] 5-11.³⁰

Dr. Flick agreed, however, that these were local trends in sea level, which can vary widely between adjacent stations.

³⁰ The hearing of August 2, 1984, was transcribed by a different reporter from the others and received a new page number series. The transcript does not carry a volume number, but it should have been labelled volume 16.

Tr. 1989-90, 1999-2000, 2025, 2035. At Prudhoe Bay, Dr. Inman suggested, the exceptional rate might reflect local subsidence of the ground as oil is pumped out. Tr. [16] 7. Another possibility was the melting of permafrost under the gravel dock (the ARCO pier of section VI) where the tide gauge is mounted. *Id.* NOS considered that the data series from Tuktoyaktuk, covering 6 years, was too short to be reliable. U.S. Ex. 84A-403 at 13-14.³¹ At Canadian Arctic stations that are farther away but have longer data series, sea level is falling. U.S. Ex. 84A-403 at 13.

Finally, Dr. Flick expressed the opinion that sea level in the Beaufort Sea is rising by at least the global rate of 1.5 millimeters per year. Tr. 2001-02. Dr. Inman agreed. Tr. [16] 8-10. However, in view of the evidence that the trend may vary locally not only in magnitude but in direction, and in view of the lack of evidence of trend specific to Dinkum Sands, I believe that NOS was justified in declining to take sea level trend into account in making its estimate of mean high water.

Even if the trend at Dinkum Sands were established, it is doubtful that an adjustment should be made. The reason for using uniform tidal epochs is to ensure national comparability of tidal data. 2 Shalowitz, *supra* note 6, at 59. That purpose is not pressing in this case. To adjust for trend would exaggerate the height of Dinkum Sands, as measured in 1981, by comparing it to a water level adjusted back to 1969. One might consider any trend in the height of Dinkum Sands as well as any trend in sea level, but this would not eliminate the exaggeration. Alaska presented testimony that barrier islands adapt to long-term increases in sea level by gaining in

³¹ Dr. Flick's data for Tuktoyaktuk covered a much longer period, but he agreed with NOS in describing the years 1962-67 as the longest stretch for which the data were relatively complete. See Ak. Ex. 84A-808.

elevation and migrating landward. Tr. 2262-63, 2309-10, 2312. If this process occurs at Dinkum Sands, then the formation's relationship to sea level should remain constant. On the other hand, if the process does not occur at Dinkum Sands, then it may be that the formation is gradually being inundated, and adjusting the sea level backward in time could prolong its legal status fictitiously. I therefore reject any adjustment for sea level trend.

c. *The adjustment for weather*

Alaska's other proposed correction is based on the proposition that, during the year of tide observations for the joint monitoring project, abnormal weather caused the water level around Dinkum Sands to be exceptionally high. Dr. Tim Barnett of the Scripps Institution of Oceanography, who appeared for Alaska as an expert in climatology and statistical modeling, presented a model that uses weather data to estimate changes in sea level. Tr. 2056-59. The general idea was that, as barometric pressure increases, sea level goes down. The weather data, from the National Weather Service, covered the period 1950-1980 and reported atmospheric pressure at an altitude of about 10,000 feet for locations at every 5 degrees of latitude and longitude. Tr. 2060-62.

Dr. Barnett first used the model to estimate monthly sea level changes at Cross Island; he found that it accounted for 55% of the variation observed there in 1980-81. Ak. Ex. 84A-701; Tr. 2066-67. This figure was described as very good performance for such a model. *Id.* Dr. Barnett then computed monthly and annual sea level averages for Cross Island for the years 1950 through 1981. Ak. Ex. 84A-702, -703; Tr. 2069-71, 2073-75.³² The conclusion was that

³² The monthly averages from Dr. Barnett's model are also shown in Ak. Ex. 84A-802(d) and in figure 5.1.

unusual atmospheric pressure in 1980-81 had led the sea level to be about 0.06 to 0.07 foot higher than normal. Tr. 2075. Alaska would therefore reduce the estimate of mean high water by 0.06 foot (0.72 inch).

The United States raises several technical questions about Dr. Barnett's method, for example whether the pressure at 10,000 feet is a good enough proxy for the pressure at sea level. In addition, the United States objects that the model takes into account only one factor affecting sea level and omits many others, including astronomical forces, winds, coastal currents, and changing ocean temperatures. It contrasts the traditional method of determining water levels by observation, which (in the long term) automatically reflects all the factors influencing these levels.

I do not find it necessary to decide whether the proposed adjustment should be adopted. If it were, it would reduce the best estimate of mean high water by 0.06 foot, bringing the NOS figure of 51.84 feet down to 51.78 feet. The situation this change would produce is shown in figure 5.4 and in the table following it.

The uncontested measurements of Dinkum Sands are below 51.78 feet. They are also below the NOS error band, whether or not the adjustment is made. If the NOS estimate of the error band is appropriate, then, according to the probabilities shown in note 21, there is less than a 2.5% chance that any of these measurements were above the true value of mean high water.

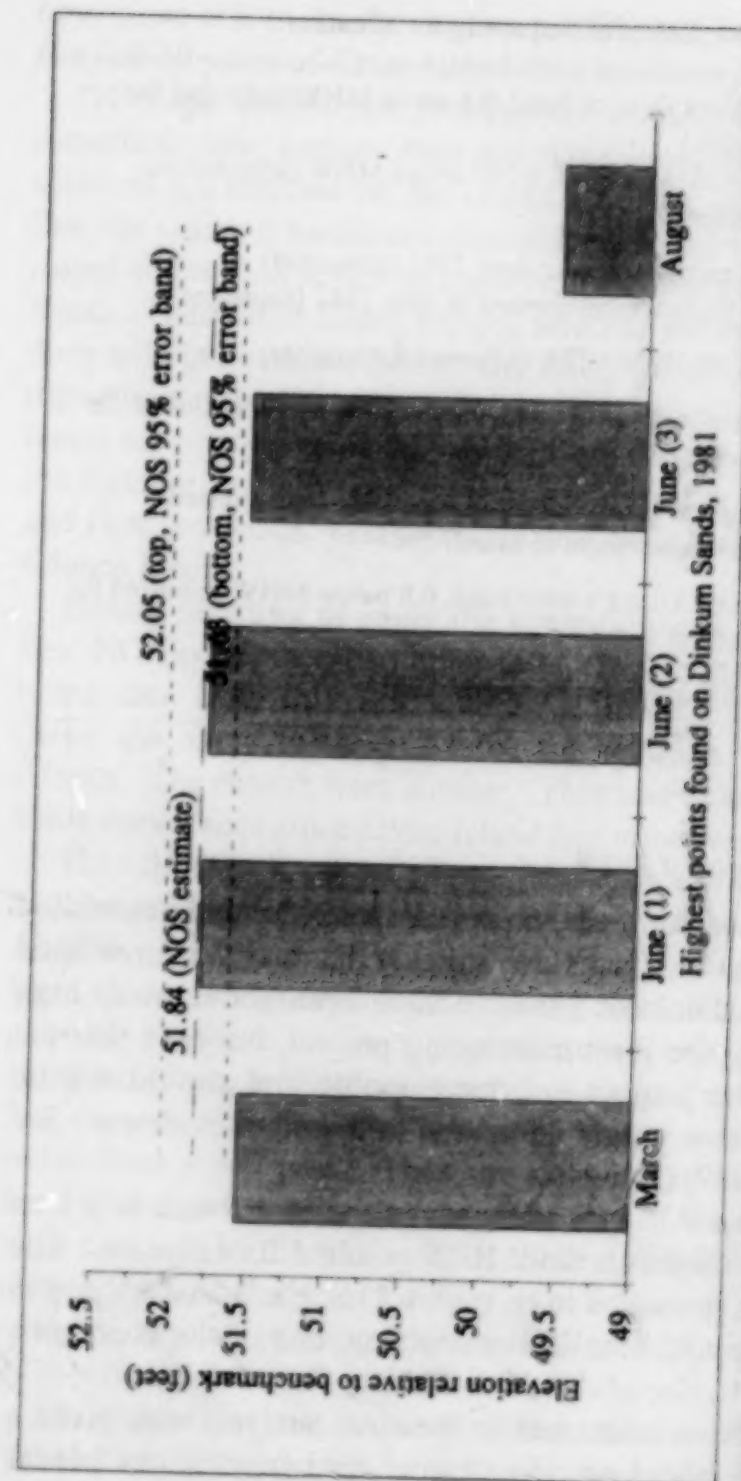


Figure 5.4. Mean high water adjusted for weather compared to 1981 measurements of Dinkum Sands. If only Alaska's adjustment for weather is adopted, the estimated value of mean high water becomes 51.78 feet. In this case, as in figure 5.3, two of the 1981 measurements of Dinkum Sands are above mean high water. Whether any others are within the 95% error band depends on which computation of the error band, ± 0.206 foot or ± 0.6 foot, is accepted.

Effect of Adjusting for Weather

52.38	top of Alaska's error band, 0.6 above MHW (adjusted for weather)
51.99	top of NOS error band, 0.206 above MHW (adjusted for weather)
51.82	highest measurement in June 1981 (contested)
51.80	second highest measurement in June 1981 (contested)
51.78	MEAN HIGH WATER (adjusted for weather)
51.57	bottom of NOS error band, 0.206 below MHW (adjusted for weather)
51.56	third highest measurement in June 1981 (uncontested)
51.56	highest measurement in March 1981
51.18	bottom of Alaska's error band, 0.6 below MHW (adjusted for weather)
49.57	single measurement in August 1981

d. The error band

Alaska also contends, however, that NOS underestimated the error band. It does not suggest that a wider error band would show Dinkum Sands to have been above mean high water during the joint monitoring project, but only that the results of the project are questionable and should not be given excessive weight compared to the other evidence. See Tr. 3430, 3437, 3445-46.

To explain Alaska's criticism of the error band, it is first necessary to indicate how NOS reached its estimate. The method was described in its report, U.S. Ex. 84A-403, and in the testimony of Mr. William Stoney, one of the coauthors. Tr. 856-901. See also USB 64-71.

The question addressed in the error analysis was, given a tidal datum based on one year of data from Cross Island,

how close is it to the datum that would have been computed if a full 19 years of Cross Island data had been available?

NOS approached the problem by looking at the nearest American tide stations that did have long data series. It selected six stations on the Gulf of Alaska and the Bering Sea, for which it had data series of from 8 to 34 years. It adjusted these data series to remove the effects of long-term trend. Then NOS asked for the selected stations, how well does a datum estimated from any one year of data represent the estimate obtained from a longer data series? The answer, based on an average of the results from the six stations, was the figure eventually used as the error band for Cross Island and Dinkum Sands: plus or minus 0.206 foot, at a 95% confidence level.

Before deciding to apply the same figure to the Beaufort Sea, NOS performed two other tests. In one test, NOS analyzed data from four tide stations in the Canadian Arctic, using the same methods as for the stations in southern Alaska. The results were similar. This was thought to be of some importance since Cross Island lies in between.

The other test involved comparisons between Cross Island and the southern Alaska stations. Although it was not possible to check directly on how well the one-year average from Cross Island represented a long-term average, it was possible to check on an analogous question: if a datum is computed from a short series of data from Cross Island (a few days or a few weeks), how well does that represent the result from a full year? Then the same question was posed for the southern Alaska stations. The results were similar in both cases. On the basis of all these computations, NOS concluded that the error band of plus or minus 0.206 foot could be applied at Cross Island and Dinkum Sands. See Tr. 877; U.S. Ex. 84A-403 at 9, 16-17.

Dr. Barnett, whose weather model was described in the last section, criticized the error band computation on several

grounds. Tr. 2143-76, 2206-12, 2220-23. Most important, he took the position that data from tide stations in southern Alaska and in Canada were entirely irrelevant. Tr. 2144-46, 2165, 2172, 2221-23. He asserted that the Cross Island data alone, one year's worth, could and should be used to estimate the result from nineteen years. Tr. 2222-23. Taking the monthly averages for the tidal datum at Cross Island as twelve independent observations, Dr. Barnett found the error bound at the 95% confidence level to be about plus or minus 0.25 foot. Tr. 2161-62. In his opinion, however, a proper analysis would show the number of independent observations to be considerably smaller, with an increase in the 95% error bound to about plus or minus 0.6 foot. Tr. 2162-64, 2170-71, 2206-07. He had not performed the computations needed to give the figure exactly. Tr. 2161, 2163, 2207.³³

On the basis of this testimony, Alaska maintains that the error band should be enlarged to plus or minus 0.6 foot. The United States defends the NOS estimate. The fundamental issue appears to be the probative value of different classes of data: a year's data from Cross Island, which may or may not support inferences about the long-term mean; and long-term data from other stations, which may or may not support inferences about Cross Island. The statistical theory and the physical science that would bear on this issue have not been fully spelled out.

Fortunately, it is unnecessary to resolve the size of the

³³ Dr. Barnett's estimates used the *t*-distribution, which is similar to a normal distribution but allows for greater variability when the estimate is based on a small sample. See generally David W. Barnes, *Statistics as Proof* 257-60 (1983); Finkelstein & Levin, *supra* note 21, at 224-25, 227. Alaska brought out that the *t*-distribution has been employed in one of NOS's own publications. Tr. 2156-59; Robert L. Swanson, *Variability of Tidal Datums and Accuracy in Determining Datums from Short Series of Observations* 8 (National Oceanic & Atmospheric Admin. Tech. Rep. NOS 64, 1974) (Ak. Ex. 84A-707).

error band. The controlling point is the estimate of mean high water, for whatever the width of the error band, the chance that the estimate of mean high water is too high is matched by an equal chance that it is too low. Although there may be more or less uncertainty about how accurate the estimate would prove to be after 19 years of observation, it is the best estimate now available.³⁴ The uncontested measurements of Dinkum Sands in 1981 are below the estimate.

F. The composition of Dinkum Sands

According to the topographic surveys made in 1981, the elevation of Dinkum Sands dropped about 2 feet during the survey period. In March and June 1981 the highest uncontested measurements were about 51.6 feet; in August 1981 the high point was about 49.6 feet. See *supra* section E(2).

The United States attributes this decline largely to the melting of ice embedded in the formation. It argues that under the Convention an island must be a "naturally formed area of land," that ice is not land, and that the elevation of Dinkum Sands must therefore be discounted accordingly. At final argument the United States clarified its position so as to distinguish between embedded ice that melts seasonally, for which it would discount the elevation, and ice at deeper levels that remains frozen permanently, which it conceded could be treated as land. Tr. 3338-41.³⁵

³⁴ The United States points out that, when the parties agreed on a one-year joint monitoring project, they consciously gave up some precision of result for the sake of reasonable time and expense. USRB 30-31.

³⁵ Both sides agree that ice on the surface of the feature does not increase its elevation. In the 1981 surveys, elevations were measured from the highest gravel encountered, regardless of whether it was exposed, under ice, or under water. See *supra* section E(2); U.S. Ex. 84A-302.

1. Evidence from 1981

The main evidence of the ice content of Dinkum Sands comes from the March 1981 survey. Mr. Pinkerton, the United States' project inspector, testified first as to excavations at the apparent highest points of the feature:

The original gravel that we encountered seemed to be gravel suspended in quite a bit of ice. Ice crystals.

....

As we further penetrated it, at times we would break out of the gravel into what appeared to be narrow layers of ice where there was no gravel; and then we would go ahead and go in deeper and then penetrate gravel again, which would be the same or at least appeared to my eyes to be the same density or composition of gravel and ice mixed together.

Tr. 683-84. See also Tr. 705-06. Dr. Reimnitz, the United States' expert geologist, then took samples of the material exposed by the excavations. After melting the samples down in coffee cans, he found each sample to consist of a layer of sand and gravel about 5 to 7 centimeters high, with another 5 to 6 centimeters of water standing on top of it. Tr. 972, 975; see U.S. Ex. 84A-506. The water above the gravel was said to come from excess ice, in the sense that it exceeded the normal porosity of the gravel layer. Tr. 958-59. Thus, the samples were said to be roughly 50% excess ice. *Id.* Assuming that the samples were representative and that summer thawing goes at least one meter deep, Dr. Reimnitz estimated that "ice collapse" would reduce the height of Dinkum Sands by 50 centimeters (1.6 foot) during the summer. Tr. 986-87, 1060-62. Dr. Reimnitz also testified to several processes that could cause excess ice to be introduced into Dinkum Sands each year. Tr. 960-66, 1076-77.

Alaska's expert on excess ice was Dr. Robert Lewellen, a geologist with Lewellen Arctic Research, who disagreed

with Dr. Reimnitz on several points. The questions he raised included whether the samples were representative, Tr. 1830-33, 1938, and how large a drop in elevation could be expected because of thawing, Tr. 1852-53.

2. Ice in international law

Alaska's central disagreement with the United States is on a legal point. In Alaska's view, subsurface ice should be treated like land, and so elevations measured from the highest gravel should not be discounted even if they might become lower in the open-water season. The United States, in contrast, says that land must be wholly terrestrial or organic and that ice has been consistently distinguished from land.

On this question of the treatment of subsurface ice that melts seasonally, the parties cite an assortment of authorities. Alaska notes that geologists and engineers operating in the Arctic consider ice to be a standard type of soil. *E.g.*, John L. Burdick et al., *Cold Regions: Descriptions and Geotechnical Aspects*, in *Geotechnical Engineering for Cold Regions* 1, 29-35 (Orlando B. Andersland & Duwayne M. Anderson eds. 1978). See Tr. 1808; Tr. [16] 17-18. I am not persuaded, however, that the Convention should be interpreted on the basis of whether engineers and earth scientists regard ice as a soil type.

Both parties refer to the celebrated case of *The Anna*, 165 Eng. Rep. 809 (Adm. 1805), which involved the capture by a British privateer of an American vessel near the mouth of the Mississippi River. The capture occurred within three miles of some "little mud islands composed of earth and trees drifted down by the river" and "not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds' nests." *Id.* at 815. The court, holding that American territory should be measured from the islands, said that "[w]hether they are composed of earth or solid rock, will not vary the right of dominion, for

the right of dominion does not depend upon the texture of the soil." *Id.* Whereas Alaska reads *The Anna* as saying that the composition of a feature is irrelevant to its status as an island, the United States emphasizes that its materials were terrestrial, namely earth and trees from the mainland. In any event the case did not involve ice, and so it does not help to settle the issue of whether ice is a variant of land or a separate substance.³⁶

Turning to modern commentators, the United States cites a paper by Dr. Robert Hodgson, formerly the Geographer of the Department of State, for the proposition that "land" in Article 10 must be composed of "dirt, rock, organic matter, or a combination thereof." Robert D. Hodgson, *Islands: Normal and Special Circumstances*, in *Law of the Sea: The Emerging Regime of the Oceans* 137, 148 (John K. Gamble & Giulio Pontecorvo eds. 1974), quoted in USB 13. In a later part of the paper, however, Dr. Hodgson discusses permafrost islands and seemingly assumes that their status as islands depends only on whether they are naturally formed. *Id.* at 197-98. These features are described as follows:

They are comprised of ordinary sand, gravel, clays, and silt. But the individual grains of these materials are rigidly cemented together by interstitial ice to depths of several hundred feet. This icy matrix gives the islands more than enough structural strength to resist any lateral forces that might be exerted by the thermal expansion and contraction of the recurring ice sheet.

Id. at 197, quoting Donald M. Taylor, *Man-made Permafrost*

³⁶ The Court considered *The Anna* at some length in the *Louisiana Boundary Case*, 394 U.S. 11, 64 n.84 (1969). The question there was whether islands could ever serve as headlands of bays under the 1958 Convention. 394 U.S. at 60. The Court noted that *The Anna* had held the mud islands were "deemed the shore," 165 Eng. Rep. at 815, and it concluded that some insular formations could be "so closely tied to the mainland as realistically to be considered part of it," 394 U.S. at 65 n.84.

Islands for Offshore Drill Sites? Ocean Industry, Nov. 1972, at 42. Dinkum Sands, of course, is not a permafrost island of the sort Hodgson describes since the disputed part of its elevation is the part that melts seasonally.

Other writers on the status of ice in international law have dealt mainly with surface ice, either fixed or floating—again in contrast to Dinkum Sands, where the disputed ice occurs below the surface gravel. The literature was reviewed for the United States by Dr. Clive Symmons, a Senior Lecturer in Law at Bristol University and author of *The Maritime Zones of Islands in International Law* (1979).³⁷ Dr. Symmons concluded that impermanence and mobility were two important objections to assimilating ice to land. See Tr. 1118-26; U.S. Ex. 84A-602 at 67-80.

Alaska responds that the writers do not view even all surface ice as subject to these objections. To illustrate with a writer quoted by both parties, Pharand says Antarctic ice shelves are "partly afloat, but their thickness and quasi-permanency render them much more like land than water," and "there appears to be a consensus among interested states that they ought to be considered as land." Donat Pharand, *The Law of the Sea of the Arctic* 181 (1973).³⁸ On the other

³⁷ Alaska sought to exclude Dr. Symmons's testimony as amounting to a brief or argument on international law. Tr. 311-14; ARB 21. The Master denied the motion, in part on the precedent of Judge Jessup's testimony before the Special Master in *United States v. Maine*. Tr. 432-33. See Hans W. Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 Va. J. Int'l L. 619, 638 & n.111 (1978) (quoting the transcript of hearing before the Special Master); *United States v. Maine*, Report of Special Master Albert B. Maris (1974), at 26, reprinted in *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases, 1949-1987* (Michael W. Reed, G. Thomas Koester, & John Briscoe eds., 1991), at 593, *exceptions overruled*, 420 U.S. 515 (1975).

³⁸ Other recent writers include C. John Colombos, *The International Law of the Sea* 129-31 (6th rev. ed. 1967); 1 Daniel P. O'Connell, *The*

hand, Pharand also discusses floating "ice islands" in the Arctic, which are "huge fragments detached from ice shelves off Ellesmere Island." *Id.* at 188. In Pharand's opinion, such islands "do not have the qualities of permanency and stability which are basic characteristics of any piece of territory," even if they become grounded. *Id.* at 196.

3. Application to Dinkum Sands

The distinction between surface ice and subsurface ice is perhaps not wholly clearcut. A borderline case was presented by the small piles of gravel that were found lying on top of clear ice in the June 1981 survey. Others were suggested by Dr. Reimnitz, who spoke of ice rubble piles "covered by a drape of gravel," Tr. 1075, and by Dr. Inman, who explained that rivers may thaw relatively early and carry sediment out over still-shorefast ocean ice, Tr. 2278-80. Symmons mentions that even icebergs sometimes "contain[] glacial debris such as rocks and, indeed, possess[] a topography rather like that on *terra firma*." Symmons, *supra* note 38, at 22. Nevertheless, I do not believe that the treatment of surface ice features like icebergs or ice shelves should control the analysis of Dinkum Sands, which has been shown to have its origins in the same processes that formed the admitted barrier islands. See section H *infra*. Furthermore, an analysis assuming that mobility and impermanence go together is unhelpful in the case of Dinkum Sands. The dis-

International Law of the Sea 197-98 (I.A. Shearer ed. 1982); Clive Symmons, *The Maritime Zones of Islands in International Law* 22-24 (1979); Bo J. Theutenberg, *The Evolution of the Law of the Sea: A Study of Resources and Strategy with Special Regard to the Polar Regions* (1984); Susan B. Boyd, *The Legal Status of the Arctic Sea Ice: A Comparative Study and a Proposal*, 22 Can. Y.B. Int'l L. 98 (1984); Jørgen Molde, *The Status of Ice in International Law*, 51 Nordisk Tidsskrift for International Ret 164 (1982).

puted ice is impermanent, but while it persists it is no more mobile than the gravel above it.³⁹

To discount the elevation of Dinkum Sands for ice that melts seasonally would raise practical difficulties. In particular, one would need a reasonably accurate prediction of how far the surface would subside in the summer. Dr. Reimnitz did not claim much precision for his estimate of 50 centimeters, either in general or as a prediction specific to the summer of 1981 at Dinkum Sands. In addition, there was evidence that the nature and amount of submerged ice can vary widely across a formation. See AB 48-49; ARB 23. The witnesses agreed that for an accurate survey of the ice content it would be desirable to have a complete cross-section, as by digging a trench along the feature. Tr. 979 (Reimnitz), 1830-32 (Lewellen). But trenching might destroy the feature by changing its balance with the environment. Tr. 1832. Furthermore, knowing the amount of ice present falls short of knowing how much of it will melt during the summer. *Id.*

To avoid the difficulties that would be caused by trying to discount for temporary subsurface ice, I recommend that Article 10 be read to assimilate all submerged ice to land. At the same time, where seasonal ice may make the difference as to whether a feature reaches a critical elevation, it must be recognized that a pre-thaw measurement cannot be relied upon as representative of the whole year. Thus, although I would not discount the elevations measured in March and June 1981 on account of temporary ice, I view the survey of August 1981 as an essential step in obtaining a fair picture of the height of Dinkum Sands. Similarly for 1982 and 1983, to be discussed next, end-of-summer observations are as important as those from early in the season.

³⁹ As to the mobility of the gravel at Dinkum Sands, see *infra* section I(2).

G. Observations in 1982 and 1983

After the conclusion of the joint monitoring project, there were a number of further observations of Dinkum Sands. Figures 5.5 and 5.6 summarize the results, discussed below. On several occasions, the feature was found to be above mean high water as determined by NOS, even without any of the adjustments considered above in section E(3).

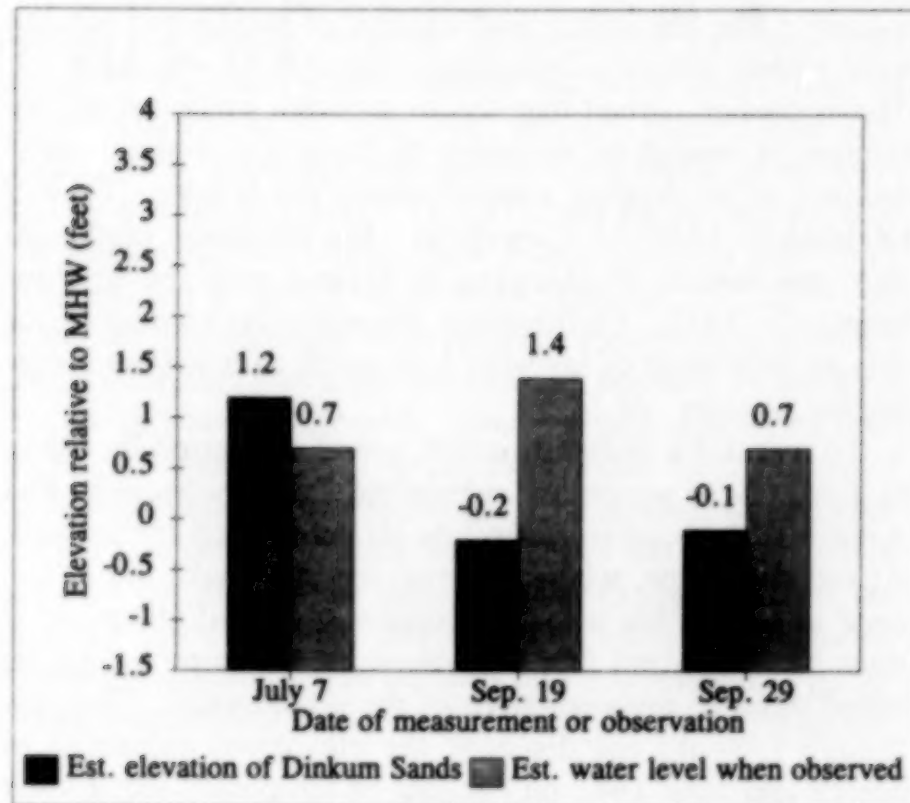


Figure 5.5. 1982 elevations of Dinkum Sands. The dark bars estimate the maximum elevation of Dinkum Sands relative to the NOS estimate of mean high water. The lighter bars compare the actual water level at the time of the measurement or observation. The July 7 observation is described in section G(1); the September estimates are derived in section G(2).

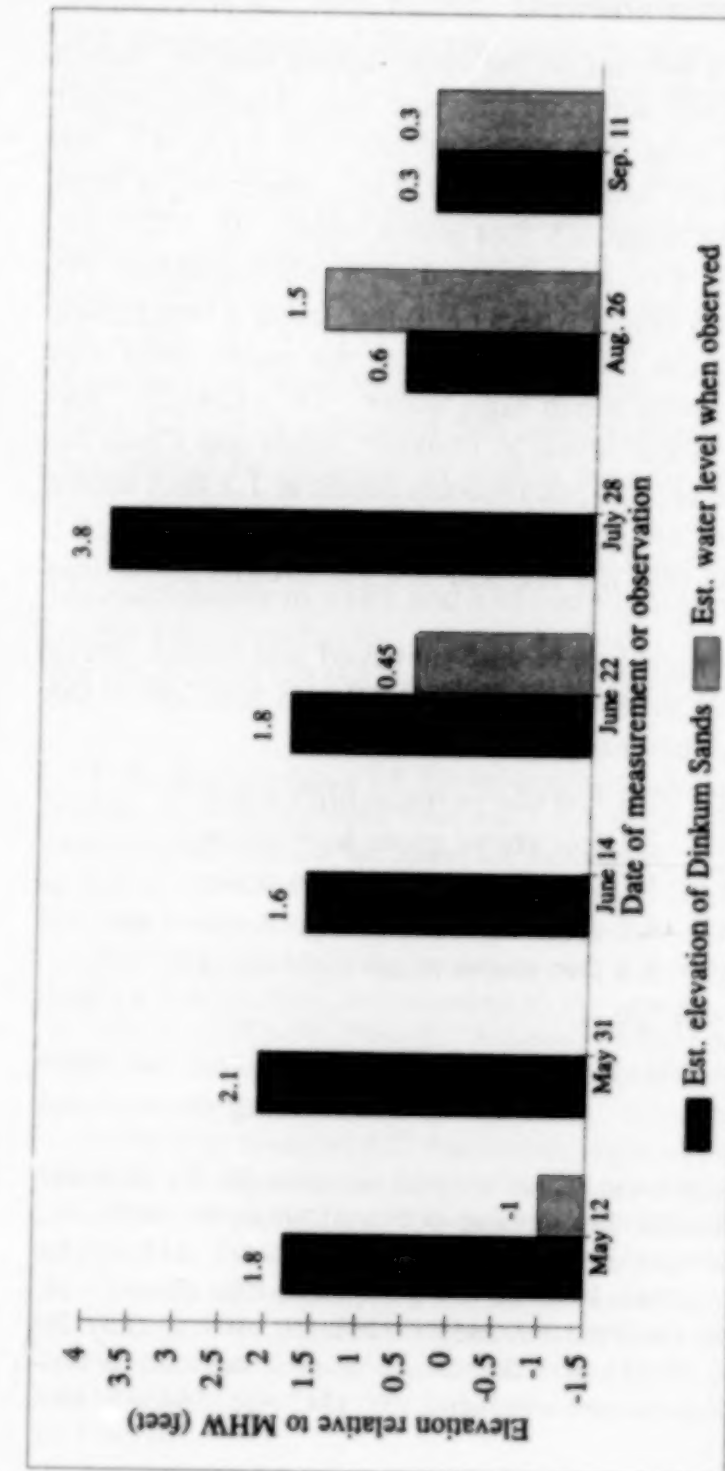


Figure 5.6. 1983 elevations of Dinkum Sands. The dark bars estimate the maximum elevation of Dinkum Sands relative to the NOS estimate of mean high water. The lighter bars, where shown, compare the actual water level at the time. The measurements for May through July are described in section G(1); the observations for August and September, in section G(2).

1. Alaska's measurements

Alaska's main witness on the observations was Mr. James Spargo, a registered surveyor who had been Alaska's project inspector on the joint monitoring project. Tr. 1722-47. He had visited Dinkum Sands on July 7, 1982, observing it from a helicopter to be about 0.5 foot above water. Tr. 1723-24, 1754-55; see Ak. Exs. 84A-402 and -403 (photographs). He then flew to Cross Island where he found, using a benchmark set there during the joint project, that the water level was about 0.7 foot above mean high water. Tr. 1724-25. Assuming that the water levels at Dinkum Sands and Cross Island were the same, this put Dinkum Sands at 1.2 foot above mean high water on July 7, 1982 (fig. 5.5). Mr. Spargo's recollection was that the ice had not yet broken up at this time. Tr. 1723.

In 1983, Dinkum Sands was surveyed and found above mean high water several times. Mr. Spargo testified to the following measurements (fig. 5.6):

May 12, 1983	1.8 feet above mean high water.
May 31, 1983	2.1 feet above mean high water.
June 14, 1983	1.6 feet above mean high water.
June 22, 1983	1.8 feet above mean high water.
July 28, 1983	3.8 feet above mean high water.

Tr. 1727-34, 1741-45.⁴⁰

All the trips except that of June 22 involved the same "water level transfer" procedure, determining the current

⁴⁰ For photographs and related material, see also Ak. Ex. 84A-404 (May 12, 1983); Ak. Exs. 84A-419 and -405 to -407 (May 31, 1983); Ak. Exs. 84A-408 and -409 (June 14, 1983); Ak. Exs. 84A-410, -518, and Tr. 1755-58, 1760-61, 1843, 1846-52, 1890-91, 1925, 1928 (June 21-24, 1983); Ak. Exs. 84A-412 to -418 and Tr. 1758-59, 1766-67 (July 28, 1983). On the trip of July 28, a flightless eider chick was seen on Dinkum Sands, although no nest was found. Tr. 1742-43, 1764; Ak. Exs. 84A-415, -416.

water level at Cross Island in relation to mean high water and the elevation of Dinkum Sands in relation to the current water level. Tr. 1738.⁴¹ The measurement of June 22 resulted from a more extensive survey. Alaska had by then consulted with NOS on how to ensure that its readings were accurate. At NOS's recommendation, Alaska installed tide gauges on both Dinkum Sands and Cross Island and collected simultaneous data for the three days from June 21 to 24, 1983. Tr. 1731, 1756. It also took other recommended steps such as releveling the benchmarks at Cross Island. Tr. 1731-32. NOS estimated that measurements using its methods would be accurate to within plus or minus 0.25 foot. *Id.*⁴²

The United States suggests that Alaska's measurements of Dinkum Sands in 1982 and 1983 are less reliable than those of the joint monitoring project in 1981. Tr. 3462-64. On the other hand, all the measurements described in this section

⁴¹ As shown in figure 5.6, the intermediate results were reported only for May 12, when the water level was 1 foot below mean high water and Dinkum Sands was 2.8 feet above the water level. Tr. 1728. The corresponding information for June 22 comes from Ak. Ex. 84A-410 (showing the water level at 0.45 foot above mean high water).

The water level transfer procedure was illustrated on a videotape made on June 28, 1983, and described by Mr. Spargo. Ak. Ex. 84A-411; Tr. 1734-41, 1762-64, 1766-67. Although the tape shows that Dinkum Sands was above sea level on June 28, no measurement for that day was entered into evidence.

⁴² The error bound of 0.25 foot is comparable to the 0.206 foot error bound NOS assigned to the 1980-81 tidal datum. The difference is apparently due to the fact that NOS obtained approximately four months of simultaneous readings in 1980-81, as against only three days in 1983. Tr. 1731-32. After analyzing the simultaneous observations in 1983, NOS reported that the correlation was excellent and that the water level transfer procedure between Dinkum Sands and Cross Island could therefore be used without any time or height corrections. Ak. Ex. 84A-420; Tr. 1745-47.

are well above the error band. The measurement of June 22, 1983, seems worthy of special weight since it used all of the procedures recommended by NOS and was carried out, moreover, with the help of NOS personnel. See Tr. 797-800; U.S. Ex. 84A-301. The 2-foot increase in height from June 22 to July 28 is puzzling, but Mr. Spargo described the point measured on July 28 as a mound of gravel that might have been under an ice rubble pile all along. Tr. 1745, 1759.

2. Late season observations

In 1982, as described above, the only visit to Dinkum Sands by Alaska's representatives was made on July 7, before the ice broke up. The United States' witness, Dr. Reimnitz, reported on four visits later in the season. On September 19, 1982, visiting by boat, Dr. Reimnitz found Dinkum Sands about 50 to 100 centimeters under water (1.6 to 3.3 feet). On September 29 it was 25 to 50 centimeters under water (0.8 to 1.6 feet). On October 1 and October 9 he made aerial observations and again found it under water; he did not estimate the amount. See U.S. Ex. 84A-301 (summary of observations); U.S. Ex. 84A-507(f) (photograph from October 1); Tr. 920-23, 944-45, 948-50.

Dr. Reimnitz did not attempt to say where Dinkum Sands stood in relation to mean high water in September and October 1982. Unlike his visits in 1979 and 1980, *supra* pages 247-48, his estimates of the depth to which Dinkum Sands was submerged were based on visual observations rather than actual surveys of the feature. In addition, Dr. Reimnitz said that September 19, 1982, was "a rather nasty day" and that waves were again running on September 29. Tr. 944. Nevertheless, Dr. Reimnitz's observations are the only ones available for the open-water season of 1982. As stressed in section F(3), late-season data is necessary to an adequate picture of the behavior of Dinkum Sands over the year.

Some inferences about the relationship of Dinkum Sands to mean high water in late 1982, using Dr. Reimnitz's minimum estimates of the depth, can perhaps be drawn from the evidence as to seasonal water levels and the 0.5 foot range of tide. In general sea level rises from about May until August, when it reaches a peak and then declines as the fall progresses. See figure 5.1; Ak. Ex. 84A-802.⁴³ As to the difference in sea level between July and September, the data are mixed (fig. 5.1). One source shows the September level about 0.4 foot lower than July; the other shows September about 0.2 foot higher than July. From July to October, there is a net drop in average sea level of about 0.3 to 0.6 foot.⁴⁴

In relation to sea level at the times of the observations, Dinkum Sands changed from 0.5 foot above water on July 7 to at least 1.6 foot below water on September 19—a difference of at least 2.1 feet. The question is how much of the difference resulted from a change in the water level and how much from a change in the elevation of Dinkum Sands. Allowing for a 0.2 foot rise in sea level from July to September and for another 0.5 foot as the maximum rise due to different states of the tide, Dinkum Sands still appears to have dropped at least 1.4 foot in elevation by September 19—taking it from 1.2 foot above mean high water to 0.2 foot below that datum. See figure 5.5. This estimate does not take into account that the poor weather on September 19 may have caused a change in the water level not already reflected in

⁴³ There is one qualification to this statement. According to the measurements at Cross Island in 1980-81 (fig. 5.1), the average sea level declined sharply (about 0.7 foot) from August to September, then rose slightly (about 0.1 foot) from September to October, before declining again (about 0.5 foot) from October to November.

⁴⁴ In 1980-81, mean sea level at Cross Island was about 0.3 foot lower in October than in July. See figure 5.1. Dr. Barnett's model, using weather data from 1950-81, predicts a typical difference of about 0.6 foot between July and October at Cross Island. *Id.*

the seasonal change. In every other respect, however, the estimate is based on the numbers most favorable to Alaska.

Again, on September 29, Dinkum Sands was observed as at least 0.8 foot under water. Compared to the July observation, when it was 0.5 foot above water, the difference is 1.3 foot. Sea level at the end of September, on the average, should lie between the averages for the full month of September and the full month of October, or about 0.2 to 0.35 foot below the average for July (fig. 5.1). If sea level on September 29 was no higher than it had been at the time of the July measurement, then the 1.3 foot difference relative to observed sea level must have been due entirely to a drop in the elevation of Dinkum Sands. The drop of 1.3 foot would put Dinkum Sands at about 0.1 foot below mean high water on September 29 (fig. 5.5).

The September observations are subject to uncertainties including the state of the tide, the effects that weather may have had on the water level, and the exact amount by which Dinkum Sands was submerged. On the other hand, the September results are in line with Dr. Reimnitz's estimate, *supra* page 270, that the feature may lose about 50 centimeters (1.6 foot) in elevation during the summer because of ice collapse. I am therefore doubtful that Dinkum Sands remained above mean high water throughout the open water season of 1982.

In 1983, after the visits of May through July, several more visits to Dinkum Sands were made by Dr. Lewellen. These later visits, made at Alaska's request, involved only helicopter observations: reading the tide staff at Cross Island, noting the appearance of Dinkum Sands, and taking photographs. Tr. 1745, 1838, 1913. Thus, on August 26, 1983, Dinkum Sands was found to be under water by less than 1 foot but above mean high water by about 0.6 foot; and on September 11, 1983, it was at sea level, which was about 0.3 foot above mean high water. See figure 5.6; Ak. Exs. 84A-514 and -515 (trip reports and photographs); U.S. Ex. 84A-

703 (translating the observations into terms of mean high water); Tr. 1837-41, 1880-82, 1913-14, 1930-31. On a third visit, made on October 12, 1983, Dinkum Sands was under water by 6 to 8 inches, but the tide staff had been destroyed by ice movement, leaving the relationship to mean high water unknown. Ak. Ex. 84A-516; Tr. 1841-43, 1928.

Finally, Dr. Lewellen had flown over Dinkum Sands on December 22, 1983, observing a very large ice rubble pile that was still there the following May. Tr. 1856; Ak. Ex. 84A-517. The pile was estimated in May 1984 to be 40 to 50 feet high. Tr. 1858. Dr. Lewellen expressed the opinion that the ice movement creating the rubble pile had also elevated the surface of Dinkum Sands. *Id.* Only snow and ice were visible, however, and no measurements had been taken.

The significance of the varying measurements of Dinkum Sands depends on interpretation of the standard for an island, to be taken up in section I. I return to the measurements in section I(3)(d).

H. Coastal processes

Alaska argues that the characteristics of Dinkum Sands are "normal and natural characteristics that one would expect and associate with barrier islands generally." AB 53-54. This conclusion was supported by the testimony of Dr. Douglas Inman of the Scripps Institution of Oceanography. Dr. Inman explained how barrier islands are created and maintained, both in general (as along parts of the east coast of the United States) and in the Arctic. The processes involve the deposition of sediment, its transport along the shore, and various kinds of other interaction with waves and currents. In addition, both Dr. Inman and Dr. Lewellen testified for Alaska on several kinds of ice-related processes that work on barrier islands.

The testimony made it clear that Dinkum Sands is part of a naturally formed barrier chain from Flaxman Island in the

east to Reindeer Island on the west, a distance of some sixty miles (fig. 3.2, *supra* at page 24). Alaska's witnesses also thought that Dinkum Sands is in long-term equilibrium. Tr. [16] 37 (Inman); Tr. 1896-97 (Lewellen). The United States' witness, Dr. Reimnitz, agreed in the sense that he suggested it might be a thousand years before Dinkum Sands disappears. Tr. 997; *see* Tr. [16] 25.

That Dinkum Sands is in long-term equilibrium does not in itself show that the formation lies above mean high water and so meets the standard for an island. But Alaska goes on to argue precisely the point that "Dinkum Sands' continued existence . . . is testimony to its island status." Tr. 3441; *see* Tr. 3392-93, 3423-24, 3437-43; ARB 68-71.

The argument begins with Dr. Inman's description of how beaches and barrier features are formed, including the onshore effect of wave action. He said that low waves tend to transport sediment onshore, building a berm, whereas large waves tend to erode and flatten the beach. Tr. 2303-06; *see* Ak. Ex. 84A-611. Alaska emphasizes Dr. Inman's point that "this beach response is the normal on/offshore response that builds beaches and it is based on a mean water level. The building goes out [sic] above mean water level and the cutting below mean water level." Tr. 2306. In this way, Dr. Inman said, "the waves maintain the barrier The wave energy rides on a mean sea level, and it is above this mean sea level that the waves tend to build a berm—and it's below this that the material is supplied to build that berm." Tr. 2310; *see also* Tr. [16] 15-16.

Alaska infers from this testimony that, because of the interaction between waves and beaches, only features lying above mean sea level can be maintained, while features below mean sea level will have their sediments dissipated. Therefore, if a feature persists at all, as Dinkum Sands has, it must be above mean sea level. Alaska further points out that the mean sea level in summer, the only time when wave

action occurs in the Beaufort Sea, is higher than mean high water (an average taken over all seasons). Tr. 3438-39. Thus, Alaska concludes that the continuing presence of Dinkum Sands proves that it is above mean high water, at least in summer. Alaska also says that Dinkum Sands is higher in winter than in summer because of the timing of ice processes that build it up. Tr. 3439.

If this reasoning is correct, it circumvents the need to analyze survey data in order to determine whether Dinkum Sands is an island. The United States responds that the reasoning must be wrong because the formation "is for long periods of many summers below mean sea level and yet it remains as a shoal." Tr. 3465.

The United States' position seems correct. Dr. Inman's testimony certainly refers to cutting processes below mean water level and building processes above mean water level. Yet the role of mean water level is not as precise as Alaska's argument requires. Dr. Inman illustrated his testimony with measurements of a California beach in October and April, the first showing the profile after the small waves of summer and the second, the changes after the large waves of winter. During the winter, erosion occurred at elevations from about 10 feet above mean sea level to 10 feet below mean sea level, and accretion took place below that. Tr. 2304-06, Ak. Ex. 84A-611. Presumably changes in the other direction occur in the shift back to a summer wave pattern.

Alaska suggests that the Beaufort Sea, because of pack ice that is always offshore, in effect has only small summer waves. Dr. Inman's testimony does not lend much support to this suggestion. He did say that waves depend on the distance over which winds can blow to generate them. Tr. 2265, 2268. He also stated, however, that the stretches of open water along the Beaufort Sea coast in summer, although narrow, are reasonably long and that the area "has some rather strong winds operating . . . that generate large

waves upon occasion." Tr. 2283. On cross-examination, Dr. Inman added that large waves during the summer will tend to reduce Dinkum Sands in size, while small waves will tend to build it; he did not claim there was a general trend during the open-water season. Tr. [16] 45. For the United States, Dr. Reimnitz observed that Dinkum Sands does not follow the textbook pattern; on the contrary, it tends to lose elevation during the summer under wave action. Tr. 987-89, 1038.

The testimony was also less than conclusive as to just when ice processes work to build the feature up again. The only actual measurement of elevation during the winter was the March 1981 survey for the joint monitoring project, which found the highest gravel to be slightly below mean high water. *See supra* section E(2). Dr. Lewellen, from personal observations, said that autumn is the primary buildup period for the formation:

[T]he feature is nourished or maintained by ice rubbing that occurs in the fall, then we have freeze-up or essentially locking in of this area for the entire winter months, we do not get movement or any sort of action until the following spring.

Tr. 1859; *see also* Tr. 1822-25; AB 22-24. Dr. Reimnitz also said that important building processes take place at freezeup in the fall. Tr. 960-66, 1076-77. On the other hand, Lewellen acknowledged that ice rubbing or ice push could also occur when the ice breaks up in the spring. Tr. 1824, 1910. Reimnitz described a process he called bulldozing that is thought to occur mainly during the winter. Tr. 1010-12. Inman described two springtime processes that may add sediment. Tr. 2278-82; Tr. [16] 13-15, 40-41; *see* AB 24-26, 27-28.

Finally, although Dr. Inman thought that Dinkum Sands was in long-term equilibrium, he did not agree that it is in

equilibrium for the short term, meaning "a matter of a summer season, a year, two years, even ten years." Tr. [16] 37. Asked whether the processes he had described had anything to do with explaining observations of Dinkum Sands as sometimes above water and sometimes below water, he replied:

I see a fairly clear relation to the natural processes that result from the fact that sediment sources and sediment transport mechanisms are not totally uniform from year to year.

So . . . we have times of maximum sediment supply followed by times of very little supply.

. . . [These processes] result in times when one section was badly eroded or more badly than its norm, followed in [turn] by that same section by a time when it would be . . . a much larger structure than [formerly].

Tr. 2330-31. Summarizing his testimony, Dr. Inman again said that "sometimes the islands ride high and sometimes they ride low, but because one is low for a period of several years is not an indication that it is necessarily disappearing." Tr. [16] 24.

This testimony seems entirely consistent with measurements and observations of Dinkum Sands as sometimes high and sometimes low. Certainly it does not compel the inference sought by Alaska, that the persistence of Dinkum Sands near mean high water implies that it must be above mean high water for most or all of the time.

I. Requirements for an island

According to section E, it is likely that Dinkum Sands was below mean high water continuously from March 1981 to August 1981, that is, throughout the period of topographic surveys for the joint monitoring project. According to the evidence reviewed in section G, Dinkum Sands was above

mean high water in July 1982 but may well have been below it by September 1982. In 1983 Dinkum Sands appears to have been above mean high water from May to September; it may or may not have slumped below by October; and its gravels may have been elevated again by December as the result of ice movement. Finally, as described in section H, very little is known about the usual elevation of Dinkum Sands during the winter.

It becomes critical to consider how this evidence is to be evaluated under Article 10(1) of the Convention.

1. *The notion of permanence*

The United States argues that Dinkum Sands lacks sufficient permanence to qualify as an island. It finds a requirement of permanence both in pre-Convention authorities and in Article 10(1) of the 1958 Convention. In Article 10(1), the United States takes permanence to be implicit in the repeated use of the word "is": An island "*is* a naturally formed area of land, surrounded by water, which *is* above water at high tide" (emphasis added). Alaska disputes both the existence of a permanence requirement and its application to Dinkum Sands.

As discussed by the parties, the concept of permanence includes several overlapping strands. One is the long-term existence of an identifiable feature; another is whether the feature's horizontal location may vary; a third is whether the feature must be always above the tidal datum.

The first point, the long-term existence of some feature, is not disputed. Taking the name "Dinkum Sands" to refer to the entire formation, most of which is always submerged, the United States agrees that a permanent feature exists. Tr. 3355-56.

2. *Horizontal permanence*

The United States emphasizes that there have been dramatic movements of the exposed area of Dinkum Sands. A survey monument was set, at or near the high point, in mid-August 1979. Tr. 1262-64, 1291; Ak. Exs. 84A-116 to -118; U.S. Ex. 84A-504 at 4. The area of the formation visible at the time ranged from at most 5 feet by 20 feet on August 12, to 15 by 30 feet on August 14. Ak. Ex. 84A-118.

In the spring of 1980 the crest of Dinkum Sands was found to be 1200 to 1300 feet away from its August 1979 location. Tr. 990-92, 1077; U.S. Ex. 84A-302, map 3. During the 1981 joint monitoring project the high points remained within about 60 feet of the 1980 position. See U.S. Ex. 84A-302. Away from the high points, which were confined to an area about 75 feet square, the measured elevations were too low to form part of an island.⁴⁵

In the State's survey of May 31, 1983, it was reported that the high points had moved again. The exposed area was now about 100 feet north and 500 feet east of the original monument set in 1979. Ak. Ex. 84A-419; Tr. 1759-61. At the survey of June 22 this area measured 60 feet along its longest dimension, Ak. Ex. 84A-410, and the maximum reported was about 25 by 75 feet on July 28, 1983, Tr. 1743.⁴⁶

⁴⁵ Relative to the 50-foot benchmark of figures 5.2 through 5.4, the elevations outside of the area containing the high points were all less than 50.2 feet. U.S. Ex. 84A-302, map 5.

If there is an island at Dinkum Sands, the three-mile belt is measured from its low-water line. See *supra* section A. Since the range of tide at Dinkum Sands is about 6 inches, the relevant low-water datum should be about 6 inches below mean high water. On the scale of the 50-foot benchmark and the estimates of mean high water shown in figures 5.2 through 5.4, one would expect the low-water datum to be at least 51 feet.

⁴⁶ Besides the movement described in the text, there was also testimony that Dinkum Sands, along with neighboring islands, is migrating

In arguing that mobility of the high points disqualifies Dinkum Sands from island status, the United States quotes its witness, Dr. Symmons:

[I]f an island position is of a fickle nature, that is to say, the position of the island moves about in a haphazard or frequent fashion from the seabed, then that does not have such permanence for the purposes of generating a maritime zone as an insular formation.

Tr. 1099; USB 28. Specifically, the United States contends that there is no such concept as an "ambulatory island" in international law. *Id.*; Tr. 1115; U.S. Ex. 84A-602 at 66-67. Although its supporting arguments are made in terms of permanence more generally, the points most relevant here are derived from the captor's counsel's argument in *The Anna*, 165 Eng. Rep. 809 (Adm. 1805), and from a policy rationale.

The policy rationale is that mariners need to be sure of the location of the territorial sea, which is arguably impossible if mobile islands are taken into account in its definition. The United States supports this contention with citations to publicists. For instance, Fulton wrote in criticism of an 1882 treaty that gave exclusive fishery rights within three miles of "dependent islands and banks" as well as from the mainland:⁴⁷

Sandbanks . . . may not be permanent, and usually vary in extent, configuration and position with lapse of time and even after a single tempest; and the extent of sea appen-

landward by about 11 meters a year. Tr. 992-93, 1000, 1022-24; U.S. Ex. 84A-510. *See also* Tr. 2262-63. It is not suggested, however, that this movement changes the legal status of the islands.

⁴⁷ The treaty in question was the North Sea Fisheries Convention, May 6, 1882, art. II, 160 Consol. T.S. 219 (in French), *translated in* Thomas W. Fulton, *The Sovereignty of the Sea* 634-35 (1911).

dent will vary likewise. It would thus be difficult to fix a precise and permanent limit in connection with them.

Thomas W. Fulton, *The Sovereignty of the Sea* 640 (1911). *See also* U.S. Ex. 84A-602 at 59-62; Tr. 1104-05, 1113. Apart from the mariner's point of view, a moving formation also causes difficulties if used as the basis for allocating resources in the surrounding submerged lands.⁴⁸

The policy arguments would be more persuasive were it not for the precedents lined against them. In *The Anna*, the captor's counsel's argument was clearly rejected by the court. The case involved a ship captured within three miles of some uninhabited mud islands near the mouth of the Mississippi River. *See supra* page 271. Although captor's counsel described the islands as "temporary deposits of logs and drift," 165 Eng. Rep. at 811, and argued that they did not carry a territorial sea, the Court of Admiralty responded without addressing whether the islands were permanent:

[T]here are a number of little mud islands composed of earth and trees drifted down by the river, which form a kind of portico to the mainland. It is contended that these are not to be considered as any part of the territory of

⁴⁸ This practical problem is highlighted in a letter of October 22, 1965, from Archibald Cox, then Special Assistant to the Attorney General, to Attorney General Nicholas deB. Katzenbach, in preparation for what became the *Louisiana Boundary Case*, 394 U.S. 11 (1969). Cox wrote:

Having the boundary an ambulatory line raises extraordinary practical difficulties in dealing with oil and gas leases. The lessee needs to know with whom he should deal and exactly what he is getting. . . . Part of his investment in drilling and locating wells should not be destroyed because periodic accretion or erosion followed by some new survey shows the line to have shifted at some unknown date after he made the investment.

Ak. Ex. 85-189 at 4.

America, that they are a sort of "no man's land," not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds' nests. . . . I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which indeed they are formed. . . . Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. . . . The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of America. . . .

I am of opinion that the right of territory is to be reckoned from those islands. . . .

165 Eng. Rep. at 815.

The mud formations at the mouth of the Mississippi were considered again in 1963, when Solicitor General Archibald Cox described them as islands despite their highly changeable and perhaps mobile nature. Title to Naturally-Made Lands Under the Submerged Lands Act, 42 Op. Att'y Gen. 241, 241-42, 250 n.9 (1963). In 1974, Special Master Armstrong recommended that Louisiana's coastline be measured from such mudlumps, and the Court accepted his recommendation. *United States v. Louisiana*, Report of Special Master Walter P. Armstrong, Jr. (1974) at 43-44, reprinted in Reed, Koester, & Briscoe, *supra* note 37, at 181, and in 59 I.L.R. 249, *exceptions overruled*, 420 U.S. 529 (1975).⁴⁹

⁴⁹ The United States argues that the appearances of Dinkum Sands are far more fleeting than those of formations in the Mississippi delta. Tr.

More generally, it is clear from the Convention that mariners must live with an ambulatory coastline. See *United States v. California*, 381 U.S. 139, 176 (1965); *United States v. Louisiana (Texas Boundary Case)*, 394 U.S. 1, 5 (1969); *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 32 (1969).⁵⁰ And the Court has chosen to accept the resource allocation problems of an ambulatory coastline as an implication of using the Convention to interpret the Submerged Lands Act. *Id.* at 32-35. I therefore conclude that a requirement of strict locational permanence should not be read into the Convention's definition of an island.

The United States argues, however, that the intermittent exposure of high points on Dinkum Sands in different places, interspersed with periods when the feature is completely submerged, amounts not to an ambulatory coastline but to an "entirely new coastline." Tr. 3358. The correct analysis, it suggests, is "that when a feature pops up today in one location, disappears, and another feature pops up tomorrow in another location, we do not have one island (assuming all other criteria are met) but two." USB 28. This is an argument that the horizontal movement at Dinkum Sands should not be considered in isolation from its vertical movement. Accordingly, I turn in the next section to the question of vertical permanence. As will be seen, vertical perma-

3361-62, 3451-52. It is true that, according to Special Master Armstrong's report, one mudlump used as part of the coastline lasted for at least ten years. The record contains no evidence, however, of the behavior of these features in general. Compare the remark by the United States' delegate at the 1930 League of Nations Conference for the Codification of International Law that, among many other geographical situations, "we have discussed the moving islands at the mouth of the Mississippi." *Acts of Conference*, *infra* note 51, at 147.

⁵⁰ Cox's 1965 letter, quoted *supra* note 48, also acknowledged that the coastline was ambulatory under international law, the Submerged Lands Act, and the 1965 *California* decision.

nence suffices to resolve the status of Dinkum Sands, making it unnecessary to consider the effects of vertical and horizontal movement together.

3. Vertical permanence

a. History and interpretation of the Convention

The arguments over a requirement of vertical permanence turn primarily on the history of Article 10(1) of the Convention. As already stated, Article 10(1) provides: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide." The drafting history of this definition goes back at least to the League of Nations Conference for the Codification of International Law, held at The Hague in 1930.⁵¹

In preparation for the conference, a questionnaire was circulated in 1929 that asked, among other things, "[W]hat is meant by an island?" *Bases of Discussion*, *supra* note 51, at 105. Replies were received from sixteen countries. *Id.* at 52-54.⁵² The committee preparing for the conference, after

⁵¹ The relevant conference documents are as follows:

Conference for the Codification of International Law, 2 Bases of Discussion: Territorial Waters, League of Nations Doc. C.74.M.39.1929.V (1929), reprinted in *2 League of Nations Conference for the Codification of International Law [1930]* (ed. Shabtai Rosenne 1975) (hereafter *Bases of Discussion*).

3 Acts of the Conference for the Codification of International Law, Minutes of the Second Committee: Territorial Waters, League of Nations Doc. C.351(b).M.145(b).1930.V (1930), reprinted in *4 League of Nations Conference for the Codification of International Law [1930]* (ed. Shabtai Rosenne 1975) (hereafter *Acts of Conference*).

⁵² The United States' reply concluded: "It would seem that any naturally formed part of the earth's surface, projecting above the level of the sea at low tide and surrounded by water at low tide, should be considered an island." *Bases of Discussion*, *supra* note 51, at 52-53.

summarizing these, offered observations and a proposed basis of discussion:

OBSERVATIONS.

Two main conceptions appear in the above replies. According to one, an island must be above water at high tide. According to the other, it is sufficient for it to be above water at low tide.

A compromise may be contemplated. It will consist in allowing an island (*i.e.*, an isolated island) to have its own territorial waters only if it is above water at high tide, but in taking islands which are above low-water mark into account when determining the base line for the territorial waters of another island or the mainland, if such islands be within those waters.

BASIS OF DISCUSSION No. 14.

In order that an island may have its own territorial waters, it is necessary that it should be permanently above the level of high tide.

In order that an island lying within the territorial waters of another island or of the mainland may be taken into account in determining the belt of such territorial waters, it is sufficient for the island to be above water at low tide.

Id. at 54.⁵³

⁵³ The United States later proposed the following amendment to this basis of discussion:

1. Each island (subject to the definitions of an island which are contained in the following paragraphs) is enveloped by its own belt of territorial waters

2. Each separate body of land which is capable of use shall be regarded as an island in determining the extent of territorial waters.

3. Each separate body of land any part of which lies within three nautical miles of the continental mainland or of another which is capable of use shall be regarded as an island, in determining the extent

At the conference, the subcommittee considering the matter revised the treatment to read as follows:

ISLANDS.

Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark.

Observations.

....

An elevation of the sea-bed, which is only exposed at low tide, is not deemed to be an island for the purpose of this Convention (see, however, the above proposal concerning the base-line).

Acts of Conference, supra note 51, at 219.⁵⁴ No action was taken on the subcommittee's report, and ultimately the entire

of territorial waters, if it stands above the level of low tide, whether or not it be capable of use.

Acts of Conference, supra note 51, at 195, 200.

⁵⁴ The proposal concerning the baseline stated, in relevant part:

BASE-LINE.

....

Elevations of the sea-bed situated within the territorial sea, though only above water at low tide, are taken into consideration for the determination of the base-line of the territorial sea.

Observations.

....

If an elevation of the sea-bed which is only uncovered at low tide is situated within the territorial sea off the mainland, or off an island, it is to be taken into consideration on the analogy of the North Sea Fisheries Convention of 1882 in determining the base-line of the territorial sea.

It must be understood that the provisions of the present Convention do not prejudice the questions which arise in regard to coasts which are ordinarily or perpetually ice-bound.

Acts of Conference, supra note 51, at 217. As to the North Sea Fisheries Convention of 1882, see *supra* note 47 and accompanying text.

conference failed for want of agreement on the width of the territorial sea. See 1 Daniel P. O'Connell, *The International Law of the Sea* 21 (I.A. Shearer ed. 1982); 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* 210 n.3 (U.S. Dep't of Commerce Pub. 10-1, 1962).

The work of the Hague Conference was later continued, under United Nations auspices, by the International Law Commission. The Commission took up the régime of the territorial sea in 1951 and produced a final report, including draft articles proposed for an international convention, in 1956. Mr. J.P.A. François served as special rapporteur.

François initially proposed to define "island" in the same language as the 1930 proposal: "an area of land surrounded by water, which is permanently above high-water mark."⁵⁵ At the 1954 session of the Commission, however, Sir Hersch Lauterpacht of the United Kingdom proposed adding the words "in normal circumstances" so as to allow for "exceptional cases." *Summary Records of the 260th Meeting*, [1954] 1 Y.B. Int'l L. Comm'n 90, 92.⁵⁶ The amendment was adopted. *Id.* at 94; *Report of the International Law Commission to the General Assembly*, 9 U.N. GAOR Supp. (No. 9) at 15, U.N. Doc. A/2693, reprinted in [1954] 2 Y.B. Int'l L. Comm'n 140, 156. The same language was retained

⁵⁵ J.P.A. François, *Report on the Régime of the Territorial Sea*, U.N. Doc. A/CN.4/53 (1952) (in French), [1952] 2 Y.B. Int'l L. Comm'n 25, 36 (translation from Ak. Ex. 84A-21 at 41); J.P.A. François, *Second Report on the Régime of the Territorial Sea*, U.N. Doc. A/CN.4/61 (1953) (in French), [1953] 2 Y.B. Int'l L. Comm'n 57, 68; J.P.A. François, *Third Report on the Régime of the Territorial Sea*, U.N. Doc. A/CN.4/77 (1954) (in French), [1954] 2 Y.B. Int'l L. Comm'n 1, 5. For full citations to the Yearbooks of the International Law Commission, see *supra* section IV, note 10.

⁵⁶ As examples of exceptional cases, Dr. Symmons mentioned hurricanes, tidal waves, and situations "where atmospheric and/or weather and high tidal factors converge." U.S. Ex. 84A-602 at 44. See also Tr. 1116.

at later sessions of the Commission. The article on islands, as it appeared in the Commission's final report, thus read:

Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.

Report of the International Law Commission to the General Assembly, 11 U.N. GAOR Supp. (No. 9) at 16, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 253, 270. The accompanying commentary elaborated:

(2) An island is understood to be any area of land surrounded by water which, except in abnormal circumstances, is permanently above high-water mark. Consequently, the following are not considered islands and have no territorial sea:

(i) Elevations which are above water at low tide only. Even if an installation is built on such an elevation and is itself permanently above water—a lighthouse, for example—the elevation is not an "island" as understood in this article.

Id. With respect to the features now called low-tide elevations, the Commission also adopted a separate article:

Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for measuring the extension of the territorial sea.

Id. at 17.

The United States' position on the work of the International Law Commission was developed in a series of internal State Department memoranda written in 1957. In the memorandum on islands, drying rocks, and drying shoals, Mr. Benjamin H. Read wrote:

The Commission's definition [of an island] is the same as that adopted by the Second Sub-Committee at the 1930

Hague Conference, except that the words "in normal circumstances" were added . . . in order to "cover exceptional cases." The added words seem incompatible with the succeeding word "permanently" in the definition. Both terms might well be omitted, since current international law does not purport to solve such minor problems . . . as how to treat land which is above sea level at neap high tide but not spring high tide or only at high tides during certain seasons of the year.

Ak. Ex. 84A-021 at 11.⁵⁷ In connection with the article on drying rocks and drying shoals, Mr. Read made a related comment:

[T]here is no direct reference to the tides in article eleven [drying rocks and drying shoals] or its commentary Do elevations that appear above sea level at spring low tide but not at neap low tide qualify? How should elevations in the Arctic regions be treated which appear above sea level at low tide only during the months of the year when the sun appears above the horizon to add to the moon's gravitational pull. The ILC has wisely refused to resolve these questions for which there is little or no legal authority.

Id. at 23-24.

At the 1958 United Nations Conference on the Law of the Sea, the United States proposed a new amendment that would drop both the words "permanently" and "in normal circumstances." U.N. Doc. A/CONF.13/C.1/L.112 (1958), U.N. Conference on the Law of the Sea, 3 Official Records 242.⁵⁸ It argued:

⁵⁷ Neap high tides are the twice-monthly lowest high tides; spring high tides are the twice-monthly highest high tides. See I Shalowitz, *supra* page 297, at 86-87.

⁵⁸ The United States' amendment also proposed adding the words "naturally-formed" to the definition, in order to prevent states from using

The requirements in the International Law Commission's definition of an island that it shall be above the high-water mark "in normal circumstances" and "permanently" are conflicting, and since there is no established state practice regarding the effect of subnormal or abnormal or seasonal tidal action on the status of islands, these terms should be omitted.

Id. The Conference accepted the United States' position. U.N. Conference on the Law of the Sea, 1st Comm., 52d mtg., 3 Official Records 160, 161-63 (1958); *id.*, 19th plen. mtg., 2 Official Records 61, 64. The final Convention text thus defined an island in the terms of Article 10: "a naturally formed area of land, surrounded by water, which is above water at high tide."

The United States argues that "permanently" is still implicit in Article 10, along with an implicit exception for abnormal circumstances. If that is correct, then Dinkum Sands would appear to be disqualified from island status by the August 1981 survey alone. Even Alaska agrees that at that survey Dinkum Sands was below the datum.⁵⁹ I am not persuaded, however, that the pre-Convention materials lead to such a clear-cut result. Neither do I agree with the United States that the Convention left any previous customary law of islands entirely intact, for the Convention did adopt a distinction between islands and low-tide elevations that had earlier represented only a compromise among inconsistent positions.

artificial land to extend the territorial sea to the detriment of freedom of the high seas.

⁵⁹ Although Alaska argued the weather was abnormal in 1981, the distance of Dinkum Sands below mean high water found in August 1981 was much greater than the claimed abnormality could account for. Furthermore, seasonal changes in the water level and seasonal changes in elevation both appear to be normal processes at Dinkum Sands.

The 1958 deletion of "permanently" must be read together with the deletion of "in normal circumstances." The two phrases were viewed as conflicting, but in fact any conflict seems to be limited to the case where abnormal circumstances lead to the temporary inundation of a feature that would otherwise qualify as an island. I do not believe the drafters intended, in eliminating supposedly conflicting standards, to adopt yet another standard less demanding than either of the first two. That the drafters declined to say an island must be "permanently above water at high tide" or "normally above water at high tide" does not mean they intended to insert some weaker qualifier such as "sometimes" or "occasionally." Even Alaska contends only that Article 10 permits a feature "to slump on occasion" below the tidal datum and still to qualify as an island. AB 64.

There is an arguably relevant international case that supports a rather demanding standard. This was an arbitration decision that considered the status of Eddystone Rock, off the coast of Cornwall in the English Channel. *Delimitation of the Continental Shelf (U.K. v. Fr.)*, 18 R. Int'l Arb. Awards 3, 65-74 (1977). Great Britain said the rock was an island because it was uncovered at mean high water spring tides and covered only at "high water equinoctial springs." *Id.* at 66. The French argued that the formation was only a low-tide elevation since it did not "remain uncovered continuously throughout the year." *Id.* at 67.⁶⁰ The court of arbi-

⁶⁰ At a later stage of the proceedings, the United Kingdom said that "Although . . . other interpretations of the expression 'high tide' are possible, . . . 'mean high-water spring tides' is the only precise one. Today . . . the height of the natural rock at the base of the stump of the old . . . lighthouse is about 2 feet above mean high-water spring tides and 0.2 feet above the highest astronomical tide." 18 R. Int'l Arb. Awards at 68. The French replied, in part, "that the British concept of 'high-water' is very questionable and a large number of States, including France, take it as meaning the limit of the highest tides; and that the information given by

tration did not decide between these positions because it found that France had already accepted the relevance of Edystone Rock as a basepoint. Moreover, the question was the choice of tidal datum (as to which the United States uses mean high water), not the treatment of a formation that itself rises and falls. Nevertheless, the parties did argue the case as if a formation, to be an island, must be almost never below water.

I conclude that Article 10 contains an implicit modifier that is at least as strong as "generally," "normally," or "usually."

b. Features of variable height

For a feature of fixed elevation, the application of Article 10 requires only that one select an appropriate tidal datum to be used as "high tide" and compare the elevation of the feature with that datum. Since it is unquestioned that the United States uses mean high water as the datum, this would be a simple comparison between two constant numbers. Either the feature is above mean high water or it is not.

For a feature of varying height, like Dinkum Sands, I have just found that the question is whether the feature is generally above mean high water. At final argument, counsel for the United States hesitated to propose a numerical standard, but he suggested seventy-five or eighty percent of the time as a range for argument. Tr. 3466. Some further comparisons may help to determine the meaning of the requirement.

In typical circumstances, a feature of fixed height, if just high enough to qualify as an island under United States practice, can be expected to be above water always except at high

the United Kingdom itself indicates that the highest part of the Rocks is only very slightly above the highest full-tides and may be covered by them." *Id.* at 72.

tides that are higher than the mean. In an atypical situation like that of the Beaufort Sea, where seasonal changes in the water level are much greater than the twice-daily changes between high tide and low tide, all the high tides of one season may be higher than any of the high tides of another. Here too, however, a feature of fixed height that is above mean high water can be expected to remain exposed at high tide for considerable periods of the year. That is true despite the fact that, when water levels are at their highest, the feature may not be seen even at low tide.

Such a feature, constantly above mean high tide but also constantly submerged at some seasons of the year, already strains the definition of an island. Alaska emphasizes that although Dinkum Sands may be invisible in summer, when water levels are high, summer submersion is not inconsistent with its being above mean high water. AB 103-04; Tr. 3399-3400. The United States emphasizes that Dinkum Sands is invisible in winter, being entirely covered for nine months of the year by the ice pack. USB 104; Tr. 3466-67.⁶¹ These characteristics in a (hypothetical) feature of fixed height, differing from those of the prototypical island that is almost always exposed, do not invite one to relax the definition further by permitting the feature frequently to slump below mean high water.

Nor would such a relaxation be consistent with the policies expressed by the Convention as a whole.⁶² First, the Convention recognizes a separate category for features that

⁶¹ The location of Dinkum Sands may be distinguishable in winter by ice rubble. Tr. 484, 1793-94, 1856. Admitted islands, however, were described as having gravel extending above the ice even in winter. Tr. 751, 754, 1749-50.

⁶² For a general review of policy factors relevant to the definition of an island and the treatment of low-tide elevations, see Myres S. McDougal & William T. Burke, *The Public Order of the Oceans* 316-19, 387-98 (1962).

are below the high-water datum, namely low-tide elevations. Islands always generate a zone of territorial sea (unless already within inland waters), but low-tide elevations do so under Article 11 only if within "the breadth of the territorial sea from the mainland or an island." In effect, Article 11 avoids extending the territorial sea in close cases, leaving a larger expanse open to the freedom of the seas.

Navigational interests also favor using reliably visible basepoints. See Tr. 1113, 1229-30; USB 25-26.⁶³ Article 11 recognizes this interest to the extent that it denies low-tide elevations a territorial sea. Article 4(3) also provides that, where a system of straight baselines is used, "Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them."

Both the interest in the freedom of the seas and the interest in visible basepoints imply that, if a feature frequently slumps below the high-water datum, it should not be treated as an island. Another difficulty is that, for either an island under Articles 10 and 3 or a low-tide elevation under Article 11, any territorial sea is measured from the "low-water line." For a feature that slumps not only below the high-water datum but also below the low-water datum—in the Beaufort Sea, about 6 inches below mean high water—there is during the slump no low-water line from which the territorial sea can be measured.

c. *The possibility of divided ownership*

Both parties have suggested an alternative to looking at whether Dinkum Sands is often enough above mean high water over the long term. This is to read the Convention as

⁶³ In *The Anna*, *supra* pages 290-92, the formations from which the territorial sea was measured were "always dry." 165 Eng. Rep. at 810.

making Dinkum Sands an island during such periods as it is above mean high water and as not an island the rest of the time. Joint Statement 13-14. Any revenues from resource exploitation around such a quasi-island would be divided based either on actual continuing measurements of its elevation, see Tr. 3387, or possibly on some formula using past measurements of Dinkum Sands as above or below mean high water. Although the proposal was not briefed, the United States returned to it on final argument as a fallback position, Tr. 3386-87, 3467-68, and Alaska did not reject this approach, Tr. 3443.

One could take the approach as following from the Convention, under which the normal baseline changes when the shoreline changes, and from the Court's acceptance of that consequence in the *Louisiana Boundary Case*, 394 U.S. 11, 32-35 (1969). It is certainly possible for a new island to come into existence and be recognized as such under Article 10. It is also possible for an existing island to disappear, changing the waters around it from territorial sea to high seas. The theory would be that these possibilities have been realized repeatedly at Dinkum Sands.

However, Article 10 does not demand an interpretation under which islands may frequently come and go, and there is no clear judicial precedent for it. Indeed, Dr. Symmons thought such a reading of the Convention was not even permitted, stating that "there is no such thing as an occasional . . . island." Tr. 1229.

The idea also raises practical problems. It is subject to all the difficulties of administering an ambulatory coastline, but, as noted below, there is no countervailing policy as in the *Louisiana Boundary Case*. It would invite continued difficult and expensive monitoring, and, as the present dispute demonstrates, possible further litigation over interpretation of the results of that monitoring.

To divide the ownership would, in particular, go against the Court's strong emphasis on definiteness and stability of grants under the Submerged Lands Act. When the Court first adopted the definitions in the 1958 Convention for purposes of the Submerged Lands Act, it noted that the decision "serves to fulfill the requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States." *United States v. California*, 381 U.S. 139, 167 (1965). The Court has recently reaffirmed its purpose "to give the SLA a 'definiteness and stability.'" *United States v. Alaska*, 503 U.S. 569, 588 (1992) (permitting the Federal Government to condition approval of an artificial coastline change upon a state disclaimer of rights to accreted submerged lands).

In the *Louisiana Boundary Case*, where frequent changes in the shoreline presented a special problem, the "policy in favor of a certain and stable coastline" had to yield to the need to apply the same definitions in all the states: since the Convention determined the coastline in California, it should also do so in Louisiana. 394 U.S. at 34.⁶⁴ Such a conflict between policies does not arise with respect to Dinkum Sands, for there appears to be no authority under the Convention for treating a formation as frequently changing between island and nonisland status. I do not believe the authorities reviewed in section I(2) are contrary.

⁶⁴ The Court added that "if the inconvenience of an ambulatory coastline proves to be substantial, there is nothing in this decision which would obstruct resolution of the problems through appropriate legislation or agreement between the parties. Such legislation or agreement might, for example, freeze the coastline as of an agreed-upon date." 394 U.S. at 34. Congress has since provided for a stable coastline through its 1986 action immobilizing boundaries fixed by coordinates under a final decree of the Court. Pub. L. No. 99-272, § 8005, 100 Stat. 82, 151 (1986) (codified at 43 U.S.C. § 1301(b) (1988)).

I conclude that Dinkum Sands should be treated as a single, continuing feature, whose legal status will change only on the basis of a sustained change in its characteristics.⁶⁵

d. *Application to Dinkum Sands*

The evidence shows that Dinkum Sands is sometimes above mean high water and sometimes below; but not every such change in elevation is automatically to change its status as an island or not. The question remains how the evidence of its varying elevation is to be combined to yield a conclusion.

Alaska initially took the position that the "true meaning" of the evidence "places Dinkum Sands always above high water." AB 64. *See also* Joint Statement 14. At final argument it modified this position, emphasizing that Dinkum Sands was found to be above mean high water in three of the four years for which findings are available: 1949, when Admiral Nygren's survey described the feature as baring 3 feet at mean high water; 1982, when Dinkum Sands was seen 1.2 feet above mean high water on July 7; and 1983, when it was surveyed several times and had a maximum height of 3.8 feet above mean high water. Tr. 3429-30, 3443-44, 3446, 3448. In Alaska's view, these results "represent the true

⁶⁵ This is not to say that dividing the ownership of submerged lands at Dinkum Sands would be undesirable as the result of a negotiated settlement. On the contrary, this solution commends itself to anyone experienced in the settlement of large economic stakes as an alternative to protracted litigation. But sophisticated counsel and parties are fully able to evaluate their own vital interests. Here, moreover, the parties point to certain legal inhibitions or lack of authority relating to the consensual disposition of the people's property. In any case, it is not a Special Master's function to recommend a compromise solution that is independent of legal principles. *Vermont v. New York*, 417 U.S. 270 (1974); *see New Hampshire v. Maine*, 426 U.S. 363 (1976).

long-term status of Dinkum Sands," and its behavior in 1981, during the joint monitoring project, was anomalous. Tr. 3446.

The United States does not deny that Dinkum Sands was above mean high water at the time of the 1949-50 survey, but it says, based on the *Merrick's* 1955 report that the feature was not there, that it did not continue above mean high water beyond 1955. As to the weight of the joint monitoring project compared to other measurements, the United States does not contend that the project results are binding, but it does argue that the joint project was the longest study made of Dinkum Sands and that it was intended by the parties to provide the facts needed to determine whether Dinkum Sands is an island. Tr. 3363-64, 3367-68, 3371, 3464-65.

I believe that my recommendation should rest primarily on the most recent period, 1981 through 1983. Within this period, I do not find the 1982 and 1983 measurements in general to be less reliable than those from 1981. Some of the later measurements were made just as carefully as those during the joint project, and most of them were far enough above mean high water so as not to depend on accuracy to hundredths or even tenths of a foot. On the other hand, it is important to consider all of the 1982 and 1983 measurements, not just those made early in the season.

The evidence for 1981-83 was summarized at the beginning of this section, *supra* pages 287-88. Although it shows Dinkum Sands sometimes above mean high water and sometimes below, the evidence is not conflicting. It simply shows that the formation does not behave exactly the same way every year. This is not surprising, since it is a creature of natural processes that are themselves not wholly uniform from year to year.

The parties agree that whether Dinkum Sands is an island is to be decided according to the preponderance of the evidence. Tr. 3381 (United States), 3411 (Alaska). The pre-

ponderance of the evidence is that, in one year of the three (1981), Dinkum Sands was consistently below mean high water and, in two years of the three (1981 and 1982), it was below mean high water by the end of the open-water season.⁶⁶

I concluded in section 3(a) that Article 10(1) requires an island to be "above water at high tide" at least "generally," "normally," or "usually." In section 3(b) I concluded that a feature does not meet the standard if it frequently slumps below the high-water datum. On the evidence before me, I find that Dinkum Sands is frequently below mean high water and therefore does not meet the standard for an island.⁶⁷

It may be that Dinkum Sands did qualify as an island in 1949-50. If so, its status has changed since then. As noted in section 3(c), another sustained change in its characteristics could conceivably take place in the future. The present evi-

⁶⁶ Dinkum Sands' loss of elevation during the summer appears to be part of a regular pattern. Even in 1983, it dropped from 3.8 feet above mean high water on July 28 to only 0.3 foot above mean high water on September 11. A similar pattern is shown in the observations from 1979 and 1980, when there is again some evidence that the formation fell below mean high water during the summer. See *supra* pages 246-48. Dinkum Sands may thus have fallen below mean high water in at least four of the five summers from 1979 to 1983.

⁶⁷ This is hardly the first time that the Court has been asked to rule on important issues of first impression in the face of a measure of uncertainty. In the instant case, the parties made a record comprising voluminous and challenging documentary evidence and expert testimony, briefing, and argument. At the same time, they undertook to tolerate recommendations based on estimates, unavoidably so because of incomplete information. See *supra* note 34 and accompanying text.

As I have stated elsewhere as chair of a presidential board, "[I] believe that the [findings and] recommendations proposed by this [Report] provide as much certainty as an uncertain real world will allow." Report to the President by Emergency Board No. 151 (appointed by Exec. Order 11,042, 3 C.F.R. 626 (1959-63)) (Southern Pac. Co. & Brotherhood of Ry. Clerks, Nat'l Mediation Bd. Case No. A-6617), at 25 (1962).

dence, however, is not strong enough to support predictions about the behavior of the feature in years after 1983.

J. Conclusion

I conclude that, on the evidence available, Dinkum Sands is not generally above mean high water and so not "above water at high tide" in the sense required by Article 10 of the Convention. I therefore recommend a holding, in answer to question 5, that Dinkum Sands is not an island constituting part of Alaska's coastline for purposes of delimiting Alaska's offshore submerged lands.

VI THE ARCO PIER EXTENSION

In 1976, under permit from the Army Corps of Engineers, the Atlantic Richfield Company built a 5605-foot extension to an existing dock facility at the west side of Prudhoe Bay. See figure 1.1. The dispute over this facility—the "ARCO pier"—concerns the effect of the extension on Alaska's coastline for purposes of the Submerged Lands Act, 43 U.S.C. §§ 1301–1315 (1988). Question 6 of the Joint Statement asks:

Should the extension of the Arco Pier constructed in 1976 be considered a part of the mainland for the purposes of measuring the three-mile Submerged Lands Act grant to Alaska in this portion of the leased area (assuming the submerged lands involved do not belong to Alaska on some other basis).

The parties agree that the pre-1976 part of the pier does count as part of the mainland, and they agree that the extension "would normally qualify" in the same way. Joint Statement 15. But the United States makes several arguments as to why the pier extension was exceptional and so should not be considered part of the mainland. These arguments are considered below.

Figure 6.1 shows the initial part of the pier and the 1976 extension. As the figure shows, about 476 acres of submerged lands are within three miles of the pier extension but are not otherwise within the three-mile limit. This is the area disputed in question 6. The assumption mentioned in question 6, that the submerged lands do not belong to Alaska on some other basis, has been confirmed by the answers already given to questions 2, 3, and 4 in section III of this report.

Only documentary evidence was offered on question 6, which was heard, briefed, and argued along with the

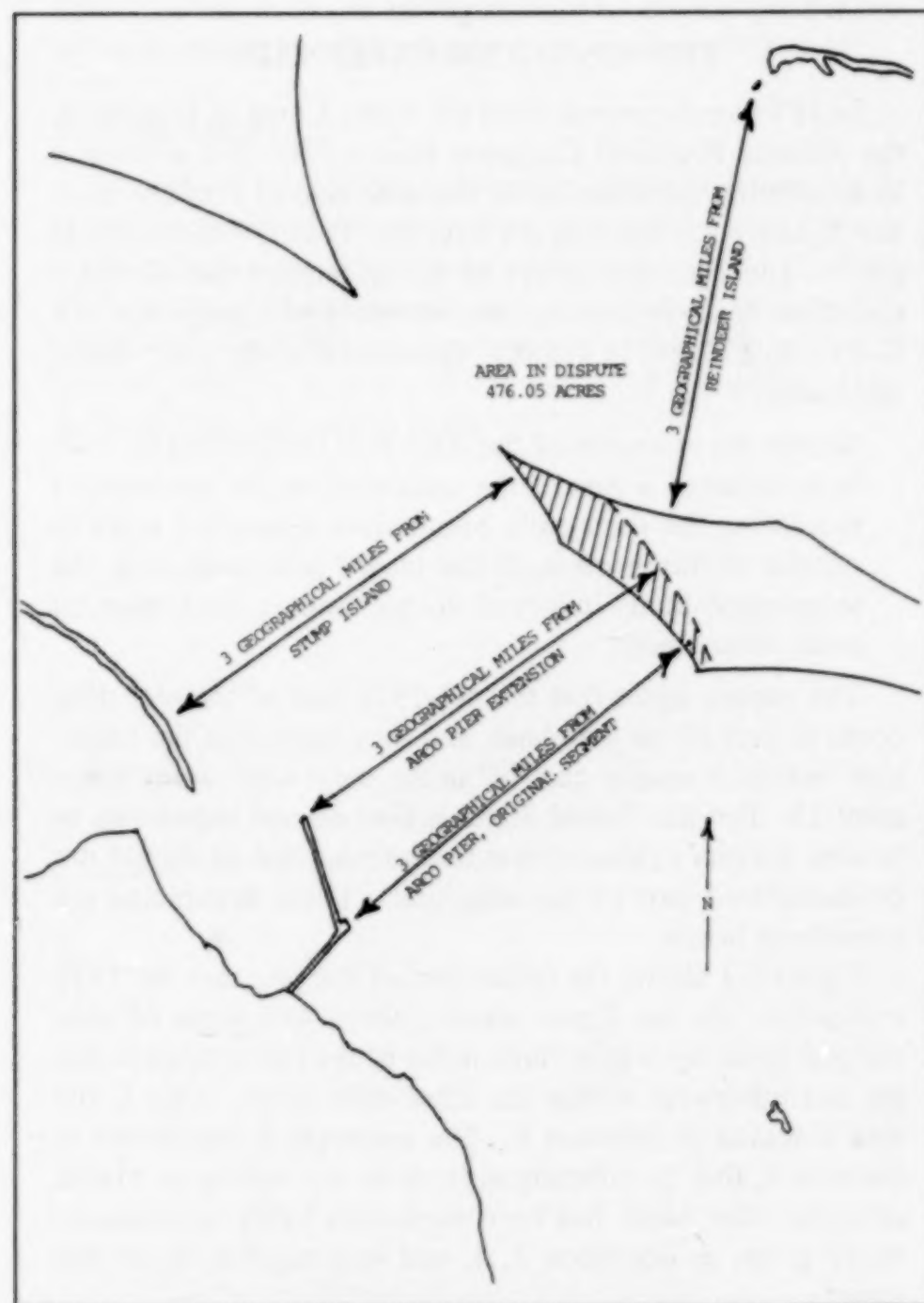


Figure 6.1. The ARCO pier and the 1976 extension.

questions treated in sections VIII and IX, *infra*.¹ The Master, accompanied by counsel for both parties, has also made a site visit to the pier.²

A. The Submerged Lands Act and the Convention

Under the Submerged Lands Act, Alaska is entitled to the lands beneath navigable waters within its boundaries. § 3(a), 43 U.S.C. § 1311(a). These include lands out to "a line three geographical miles distant from the coast line." § 2(a)(2), 43 U.S.C. § 1301(a)(2). The coastline is defined as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." § 2(c), 43 U.S.C. § 1301(c). For the purpose of question 6, it is the first part of this definition that is relevant: "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea."

The Court has determined that the coastline, for purposes of the Submerged Lands Act, is in general to be the same as the baseline for purposes of the Convention on the Territorial Sea and the Contiguous Zone, *done* Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205. *United States v. California*, 381 U.S. 139, 165 (1965). Furthermore, the Court has estab-

¹ The relevant briefs will be referred to as AB, USB, ARB, and USB. Their full titles are: Alaska's Brief after July 28-29, 1980 Hearing before Special Master; Post Trial Memorandum of the United States on Issues 6, 7, 8, 9, 10 and 11; Alaska's Reply Brief; Post Trial Reply Brief for the United States on Issues 6, 7, 8, 9, 10 and 11. In contrast to the other issues covered in these briefs, no supplemental briefings were required on the ARCO pier extension.

² Since the case was heard, the pier has been extended again. The further extension was made under an agreement in which Alaska disclaimed any change in its rights under the Submerged Lands Act as a consequence of the extension. See *United States v. Alaska*, 503 U.S. 569, 592 n.14 (1992).

lished that the location of the coastline was not fixed permanently as of the passage of the Submerged Lands Act in 1953. Rather, the coastline—and hence the dividing line between federal and state rights—may vary with both artificial changes and natural changes in the shoreline. *United States v. California*, 381 U.S. at 176–77; *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 32–34 (1969).

B. The pier extension as a permanent harbor work

1. Articles 3 and 8 of the Convention

The Convention contains two articles that may be relevant to the status of the 1976 ARCO pier extension:

Article 3

Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 8

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast.

The Court has commented in two cases on the relation between Articles 3 and 8. In each case, the conclusion was that neither article was satisfied. In the *Louisiana Boundary Case*, 394 U.S. 11, 36–40 (1969), the Court rejected an argument that dredged channels leading to inland harbors were themselves covered by Article 8. Even if the underwater channels were “harbour works” forming “an integral part of the harbour system,” they could not be “regarded as forming part of the coast” under Article 8 because they did not have low-water lines as required by Article 3. 394 U.S. at 37–38.

The Court explained that Article 8 was not an exception to Article 3:

Louisiana argues that, in view of the proviso “[e]xcept where otherwise provided in these articles,” the United States cannot maintain that a dredged channel is not a baseline just because it has no low-water line. Article 8, it is said, is one of the provisions covered by the exception in Article 3. This argument, however, founders on the language of Articles 3 and 8. The exception in Article 3 refers to methods of determining the baseline other than by the low-water mark along the coast. Article 8 does not provide such an alternative method, but merely identifies certain structures which are to be considered part of the coast.

Id. at 38 n.44.

The second case in which the Court commented on the relationship between the two articles was *United States v. California*, 447 U.S. 1 (1980). Here the Court dealt with structures that were raised above the ocean surface on pilings. The Court agreed with its Special Master that the structures did not extend California’s coastline. As to Article 3 and its relationship to Article 8, the Court said:

Open piers, such as those at issue here, are elevated above the surface of the ocean on pilings. Accordingly, they do not conform to the general rule for establishing a baseline from which to measure the extent of a coastal state’s jurisdiction. . . . The type of construction of the piers does not, without more, require a determination adverse to California. . . . But the absence of a “lower low-water line” deprives the piers of a “normal baseline,” and precludes them from falling within the ambit of Art. 3.

The ultimate conclusion of the Special Master implicitly recognizes this proposition. . . . [B]y considering and disposing of California’s claim under Art. 8 of the Con-

vention, in effect on [an?] exception to the general rule embodied in Art. 3, . . . he necessarily found the criteria of Art. 3 were not satisfied.

Id. at 6. The Court then went on to find that the piers were not harbor works. *Id.* at 7.

2. The question of permanence

In contrast to the underwater channels of the *Louisiana Boundary Case* and the above-water piers of *California*, the ARCO pier extension undisputedly does have a low-water line as contemplated by Article 3. It is composed of gravel fill, in volume about 300,000 cubic yards, compacted into a structure 5605 feet long and, at its level surface, 30 to 50 feet wide. The fill is from 10 to 20 feet deep, rising above water depths of 5 to 12 feet. See U.S. Exs. 74 and 75 (original application and plans for the pier extension); Ak. Ex. 131 (finding that the structure conforms to permit conditions).

Alaska suggests that nothing more is required to make the pier extension part of the baseline under the Convention. Tr. 2502. The United States takes the position that the pier extension, being a harbor work, must also satisfy Article 8. If it can form part of the baseline merely by virtue of Article 3, the United States argues, then there is no role for the Article 8 requirement that harbor works be permanent. Tr. 2450-51. Although Alaska agrees that the pier extension is a harbor work, the parties disagree on whether it is permanent.

Without taking a position on the role of Article 8, I turn to the arguments over permanence. These do not rest on the physical characteristics of the pier extension, for, as already noted, the parties agree that it is "a solid structure that would normally qualify" as part of the coastline. Joint Statement 15. Rather, the United States says that the structure is exceptional because of its legal status.

Under legislation of long standing, any construction af-

fecting navigable waters requires a permit from the Army Corps of Engineers.³ The United States points out that in the construction permit issued to ARCO, the Corps of Engineers reserved the right to order removal of the structure.

The United States relies on two paragraphs of the permit. The first of these provides:

ERECTION OF STRUCTURE IN OR OVER NAVIGABLE WATERS: That the permittee, upon receipt of a notice of revocation of this permit . . . shall, without expense to the United States and in such time and manner as the Secretary of the Army or his authorized representative may direct, restore the waterway to its former conditions. . . .

Joint Statement 15a. At final argument, it was brought out that this provision is not unique to the ARCO pier extension but is a standard provision in permits issued by the Corps of Engineers. See Tr. 2456, 2501-02. See also 33 C.F.R. § 209.120, App. C, at 397 (1976) (standard form of permit, including the same paragraph). The paragraph therefore makes the pier extension no less permanent than other structures built under permit from the Corps.⁴

³ The Rivers and Harbors Appropriation Act of 1899 prohibits "the building of any . . . structures in any . . . water of the United States . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army." Ch. 425, § 10, 30 Stat. 1121, 1151 (1899) (as codified at 33 U.S.C. § 403 (1988)).

In addition, the Federal Water Pollution Control Act provides that "[t]he Secretary of the Army, acting through the Chief of Engineers, may issue permits . . . for the discharge of dredged or fill material into the navigable waters . . ." Pub. L. No. 92-500, sec. 2, § 404(a), 86 Stat. 816, 884 (1972) (codified as amended at 33 U.S.C. § 1344(a) (1988)).

⁴ As to the conditions for revoking a permit, these are also provided for in the Code of Federal Regulations and incorporated in the permit itself. The gist is that a permit can be revoked either (1) for violation of the permit conditions or (2) upon a finding that revocation would be in the public interest. The permittee is entitled to request a public hearing

The second paragraph on which the United States relies is specific to the ARCO pier extension, and its evaluation requires some additional background. In 1973, Congress had passed the Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, title II, 87 Stat. 569, 584 (1973) (codified at 43 U.S.C. §§ 1651-1655 (1988)). By 1975, the pipeline was under construction, and the oilfield operators, ARCO and BP Alaska Inc., were working to be able to produce oil as soon as the pipeline was ready. Equipment needed for the oilfield development was transported from Seattle and unloaded from barges at Prudhoe Bay. In October 1975, at the end of the summer shipping season, barges carrying necessary equipment became trapped in ice before they could be unloaded. To make unloading possible before ice breakup the following July, ARCO proposed to extend the dock to meet the barges.

On October 8, 1975, ARCO applied to the Corps of Engineers for permission to extend the dock, and it requested emergency processing of the application. U.S. Ex. 73.⁵ The permit was granted on January 8, 1976, subject to various conditions. The United States points to paragraph c(1), calling for environmental studies of the structure, as showing that its authorization was only temporary:

c. That structure shall be removed by the permittee commencing on 30 June 1976, unless the permittee has satisfied the District Engineer of sufficient progress toward the following permit conditions:

(1) That the permittee shall conduct or bear the cost of

on the grounds for revocation. See "General Conditions," Joint Statement 13a-15a; 33 C.F.R. § 209.120, App. C, at 395-96 (1976).

⁵ The date typed on the application, U.S. Ex. 73, is November 8, 1975. For documents indicating that October 8, 1975, is the correct date, see the permit, Joint Statement 12a, and Ak. Ex. 119.

conducting studies designed by the resource agencies to determine the environmental impact of the structure. Subject to the results of these studies and recommendations of the National Marine Fisheries Service, Fish and Wildlife Service, Environmental Protection Agency and/or agencies of the State of Alaska, based on these findings, the District Engineer may direct the permittee to leave in place, remove or modify the emergency structure.

(2) That the permittee shall prepare a plan that demonstrates that the facilities conform with an accepted and unitized long-range plan for marine cargo handling in the Prudhoe Bay area.

Joint Statement 16a-17a.

The record indicates that paragraph c no longer provides a potential ground for ordering removal of the pier extension. Alaska has supplied numerous documents evidencing ARCO's work toward meeting the stated conditions. Ak. Exs. 121-133. They begin with a letter of February 27, 1976, by which ARCO submitted to the District Engineer an outline of its proposed program of studies (Ak. Ex. 121). They continue through October 1976, when ARCO submitted reports from two of the studies (Ak. Exs. 132-133). They conclude with a report by the Corps of Engineers dated October 1977 stating, "The causeway is complete and conforms to permit conditions" (Ak. Ex. 131).

The United States suggests in passing that Alaska also gave only a temporary authorization for the pier extension. It does appear to be the case that Alaska retained an independent power to require removal of the structure. In an agreement between ARCO and the Alaska Department of Natural Resources, concluded December 5, 1975, the State agreed to issue certain letters of nonobjection and ARCO agreed, among other things:

That the State may exercise its authority to order removal, use restrictions, or modifications beginning as early as June 30, 1976, or at any time thereafter that the state procedures have been satisfied and adequate factual basis exists for decision. Such decision may, at the option of the State, be deferred pending one or more seasons of use of the structure and further studies regarding the environmental impact of the structure.

Ak. Ex. 112, U.S. Ex. 76. In contrast to the conditions of the federal permit, the record does not include evidence that the State considered this condition to have been discharged. On the other hand, there is nothing to suggest that the results of the studies commissioned by ARCO under the federal permit conditions were not equally acceptable to the State.

Finally, in an argument separate from the permit conditions, the United States says that ARCO did not intend the pier extension to be permanent. The immediate purpose, it is agreed, was to permit unloading of the ice-locked barges in the winter of 1976. Any use beyond that, the United States notes, was to be "in support of operations related to oil development and operation of the trans-Alaska pipeline in Prudhoe Bay." USB 52. The United States reasons that because "oil operations are finite by reason of the nature of the resource," the pier extension must have been intended to be temporary. *Id.*

This argument is without merit. In the first place, it confuses the existence of the pier extension with its function. Even if the facility should fall into disuse, it will not thereby vanish from the shoreline. Second, the argument suggests that harbor works cannot be called permanent unless they have an infinite life expectancy. But the meaning of "permanent" is closer to "continuing indefinitely" than to "continuing infinitely." *E.g., Texas & Pac. Ry. v. Marshall*, 136 U.S. 393, 403 (1890). The *Oxford English Dictionary*

(compact ed. 1971) gives as the first meaning of "permanent":

Continuing or designed to continue indefinitely without change; abiding, lasting, enduring; persistent. Opposed to *temporary*.

Webster, in distinguishing "permanent" from synonyms such as "lasting," says that "permanent" usually adds "the implication of being designed or planned to stand or continue indefinitely." *Webster's Ninth New Collegiate Dictionary* 675, s.v. "lasting" (1987). According to *Black's Law Dictionary* 1139 (6th ed. 1990), "permanent" is "[g]enerally opposed in law to 'temporary,' but not always meaning 'perpetual.' "

A long-term use, indefinite in duration, was in fact contemplated for the pier extension. In early negotiations, ARCO declined to agree to remove the structure after unloading of the barges, and it made clear that it anticipated a continuing use.⁶ The Corps of Engineers permit also looked toward a long-term use, in condition c(2), as already quoted:

⁶ At a first meeting on ARCO's application, held on October 16, 1975, and including both federal and state agencies, Alaskan officials specifically suggested that the dock be considered temporary. Ak. Ex. 110, para. 8. ARCO's response is summarized in the minutes of the meeting as follows:

Mr. Carr [of ARCO] tried to summarize the feelings of the group by stating that everyone agrees to the emergency and the environmental considerations in Prudhoe Bay. ARCO is willing to consider other conditions, but is concerned about the cost of [t]he recommended stipulations—such as removal of the dike—and would hate to say now that they could agree to such a condition.

Id., para. 9. Another meeting the next day resulted in ARCO's agreeing to essentially the same conditions that were ultimately placed in the permit, including the following paragraph:

Permittee shall prepare a plan that demonstrates that the facilities con-

(2) That the permittee shall prepare a plan that demonstrates that the facilities conform with an accepted and unitized long-range plan for marine cargo handling in the Prudhoe Bay area.

Although there are powers that might still be exercised to order removal of the pier extension (*supra* pages 317, 319),

form with an accepted and unitized long-range plan for marine cargo handling in the Prudhoe Bay area.

Ak. Ex. 111.

On November 8, 1975, ARCO wrote to the Commissioner of the Alaska Department of Natural Resources:

While we are primarily interest[ed] in solving the present emergency, we see a continuing need for the causeway extension for barge shipments in subsequent years and possibly for water flood facilities directly connected to Prudhoe Bay Field production. Under the circumstances we question whether we should be exposed to the risk and expense of removing the dock extension prior to the completion of the field facilities and request your concurrence.

U.S. Ex. 75. A supporting letter from BP Alaska concurred:

In our opinion the causeway will have a long term use for the Prudhoe Bay field operations. It will have particular value in 1976 when there will be another 35 to 40 barges of supplies to be unloaded. The proposed new causeway, extending into deeper water and allowing direct unloading of large, ocean going barges will considerably increase the efficiency of unloading operations and make them far less vulnerable to weather and ice conditions. As regards the possible effect of the causeway on marine life, if it is clearly shown in the future that the causeway has a serious effect then we would consider such alternatives [sic] that would alleviate the problem.

Id. When ARCO and the State finally reached agreement on December 5, the condition included—similar to that in the federal permit—was that ARCO would “prepare a plan that demonstrates that the structures conform with an accepted and unitized long range plan for marine cargo handling and other petroleum related activities in the Prudhoe Bay area.” U.S. Ex. 76, Ak. Ex. 112. For the development and submission of the plan during 1976, see Ak. Exs. 121, 124, 127, and 132.

their existence sets no particular limit on the future of the structure.⁷

I therefore find that the ARCO pier extension built in 1976 qualifies as a permanent harbor work and forms part of the baseline under Articles 3 and 8 of the 1958 Convention.

C. The Convention as controlling

The United States maintains that, even if the pier extension does form part of the baseline under the Convention and so is used in delimiting the territorial sea claimed against other nations, still it should not be considered part of the coastline for purposes of delimiting the federal-state boundary under the Submerged Lands Act. The arguments here are based on the circumstances under which the Corps of Engineers issued the permit to extend the pier. The central circumstance is not an action but an omission: the United States did not seek an agreement with Alaska about the effect the construction would have on the boundary between federal and state submerged lands.

1. Background

The Court recognized the possibility of making such agreements when it first adopted the Convention for purposes of measuring grants under the Submerged Lands Act. *United States v. California*, 381 U.S. 139 (1965). Under the heading “Artificial Accretions,” *id.* at 176–77,⁸ the Court first summarized the 1952 report of Special Master William

⁷ Indeed, the building of a further extension beyond the one disputed here adds to the likelihood that it will have a long duration. See *supra* note 2.

⁸ The Court also included a section headed “Harbors and Roadsteads,” in which it quoted Article 8 and took that article to define the line incorporated in the Submerged Lands Act. 381 U.S. at 175.

H. Davis (*supra* section III, pages 103-04). The Master, writing before the Submerged Lands Act and on the premise that lands seaward of the baseline belonged to the Federal Government rather than the states, had ruled that lands once submerged but since "enclosed or filled [by means of artificial structures] belonged to California because such artificial changes were clearly recognized by international law to change the coastline." 381 U.S. at 176. The Master had added, however, that this did not leave the State free to extend its coastline at will. He "recognized that the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and that the effect of any future changes could thus be the subject of agreement between the parties."

Id. The Court agreed with the Master's conclusions:

We think . . . when a State extends its land domain by pushing back the sea . . . its sovereignty should extend to the new land The considerations which led us to reject the possibility of wholesale changes in the location of the line of inland waters caused by future changes in international law, *supra*, pp. 166-167, do not apply with force to the relatively slight and sporadic changes which can be brought about artificially. Arguments based on the inequity to the United States of allowing California to effect changes in the boundary between federal and state submerged lands by making future artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters.

Id. at 177 (footnote omitted).⁹

⁹ The Court has also mentioned the possibility of federal-state agreements with respect to natural changes in the shoreline. *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 34 (1969). See *supra* section V, note 64 and accompanying text.

The passage just quoted surely contemplates that, if the United States does not exercise its power over navigable waters in order to protect itself against the effects of new construction on the federal-state boundary, then the coastline under the Submerged Lands Act will follow the baseline under the Convention.

Since the *California* case, the Federal Government has developed procedures aimed at protecting its interests as suggested in *California*. Permits issued by the Army Corps of Engineers have sometimes been conditioned on a state's agreement not to claim any new rights under the Submerged Lands Act on account of the construction. For example, in a separate case involving Alaska, the Army required such a disclaimer from the State before authorizing construction of port facilities for the city of Nome. The Court upheld the authority of the Secretary of the Army to impose such conditions. *United States v. Alaska*, 503 U.S. 569 (1992).¹⁰ In passing, the Court recognized that the Secretary might not require a disclaimer in every situation:

[I]n those circumstances in which the Secretary does not require a disclaimer and the three-mile federal-state boundary extends from the new base line, presumably should there arise any of the federal-state problems Alaska identifies, changes in nautical maps could readily be amended to reflect such changes.

Id. at 1617.

2. The argument from emergency

Since the United States and Alaska did not make an agreement as to the effect the ARCO pier extension would

¹⁰ Another example is the second extension to the ARCO pier, mentioned *supra* notes 2 and 7 but not in issue here. For the text of Alaska's disclaimer as to the second extension, see *United States v. Alaska*, 503 U.S. 569, 592 n.14 (1992).

have on the coastline, it would ordinarily follow that the effect of the extension depends only on the Convention. The United States argues, however, that the Convention should not be applied because the permit was issued in an emergency that left no time for negotiating an agreement with Alaska.

There is no doubt that the situation in which the pier extension was built was viewed on all sides as an emergency situation. As the United States points out, the Trans-Alaska Pipeline Authorization Act, passed in 1973, clearly made the construction and operation of the pipeline a national priority. In this Act Congress found that the "early development and delivery of oil and gas from Alaska's North Slope" was in the national interest; and it sought "the earliest possible construction" of the pipeline, to be carried out "without further administrative or judicial delay or impediment." 43 U.S.C. §§ 1651(a), 1651(c), 1652(a). The mandate extended to related facilities as well as the pipeline itself. Thus, Congress directed "appropriate federal officers and agencies to issue . . . permits . . . that are necessary for or related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system"; and it authorized such officers and agencies to "waive any procedural requirements of law or regulation" in order to accomplish the purpose. 43 U.S.C. §§ 1652(b), 1652(c).¹¹

¹¹ The Act provides, at 43 U.S.C. §§ 1651-1652 (1988):

§ 1651. Congressional findings and declaration

The Congress finds and declares that:

(a) The early development and delivery of oil and gas from Alaska's North Slope to domestic markets is in the national interest because of growing domestic shortages and increasing dependence upon insecure foreign sources.

....

(c) The earliest possible construction of a trans-Alaska oil pipeline from the North Slope of Alaska to Port Valdez in that State will make

When ARCO's barges became ice-locked in October 1975, the pipeline was scheduled for completion in 1977. In applying for a permit to extend the dock, ARCO requested emergency processing of its application. U.S. Ex. 73.¹² The application explained:

the extensive proven and potential reserves of low-sulfur oil available for domestic use and will best serve the national interest.

§ 1652. Authorizations for construction

(a) Congressional declaration of purpose

The purpose of this chapter is to insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment. To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers to the fullest extent in the authorizations and directions herein made and in limiting judicial review of the actions taken pursuant thereto.

(b) Issuance, administration, and enforcement of rights-of-way, permits, leases, and other authorizations

The Congress hereby authorizes and directs the Secretary of the Interior and other appropriate federal officers and agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases, and other authorizations that are necessary for or related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system, including roads and airstrips, as that system is generally described in the Final Environmental Impact Statement issued by the Department of the Interior on March 20, 1972. . . .

(c) . . . [W]aiver of procedural requirements . . .

. . . Federal officers and agencies . . . may waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of this chapter. . . .

¹² The Corps of Engineers regulation as to emergency processing read as follows:

(viii) If the circumstances surrounding a permit application require emergency action and the District Engineer considers that the public interest requires that the standard procedures must be abbrevi-

Due to late arrival of barges at Prudhoe Bay caused by ice conditions; dock extension, exclusive of existing dock, is needed to assure timely off loading, delivery and installation of production facilities related to Trans Alaska Pipeline (TAPS) projected startup and crude oil throughput.

U.S. Ex. 73. In meetings and letters ARCO repeated that it would be hard-pressed to put oil in the pipeline on schedule unless the barges could be unloaded before the next summer. See U.S. Exs. 74, 75, 78. The Corps of Engineers and officials responsible for the pipeline agreed that emergency action was called for. See Ak. Exs. 119, 120. When the permit was granted in January 1976, ARCO agreed to certify "that construction of the proposed structure in accordance with the inclosed plans is necessary because of a bona fide emergency." Joint Statement 16a.

The United States makes two points as to the effect of the emergency. First, it suggests that because the time was so short it had no practical opportunity to negotiate an agreement with Alaska. Second, the United States says that because the project was necessary to advance a national priority, it might not have been able to hold out for an agreement from Alaska not to claim new rights to submerged lands.

Alaska replies, "Reduced to its essentials, the argument is that the Federal executive did not negotiate an agreement at the time because of practical considerations and, therefore, that the Federal judiciary should now impose one." ARB 37.

ated in the particular case, he will explain the circumstances and recommend special procedures to the Chief of Engineers, ATTN: DAEL-CWO-N by teletype. The Chief of Engineers, upon consultation with the Secretary of the Army or his authorized representative and other affected agencies, will instruct the District Engineer as to further processing of the application.

33 C.F.R. § 209.120(i)(2)(viii) (1976), 40 Fed. Reg. 31,322 (July 25, 1975).

It also observes that "the United States could not necessarily have obtained the result it now seeks had there been no emergency." ARB 39. I think Alaska is right on both points. Nothing in the rationale of *California* suggests that, when the impetus to extend the coastline comes not from the state but from the implementation of a national policy, the United States is entitled to be relieved of any negative consequences of the extension whether or not the state agrees to give up the corresponding benefit. I conclude that the existence of an emergency was not enough to relieve the United States of the burden of seeking an agreement from Alaska before issuing ARCO a permit to build the pier extension.

3. *The argument from the regulations*

The United States also argues that the permit to extend the pier was issued by the Corps of Engineers in violation of its own regulations. In recognition of the Court's discussion in *California*, 381 U.S. at 176-77, the Corps had adopted a regulation requiring that, before issuance of a permit for work that might affect the location of the coastline, the decision must be coordinated with the Solicitor of the Department of the Interior and the Attorney General. 33 C.F.R. § 209.120(g)(10) (1976).¹³ The regulation did not mention

¹³ The version of the regulation current in 1975 appears at 33 C.F.R. § 209.120(g)(10) (1976), as follows:

§ 209.120. Permits for activities in Navigable Waters or Ocean Waters.

....
(g) *Policies on particular factors of consideration.* ...

....
(10) *Effect on limits of the territorial sea.* Structures or work affecting coastal waters may modify the coast line or baseline from which the three mile belt is measured for purposes of the Submerged Lands Act and International Law. Generally, the coast line or base line is the line of ordinary low water on the mainland; however, there

the purpose of providing opportunity to seek state disclaimers of additional submerged lands, but the Court has held that this may be inferred from the regulatory scheme. *United States v. Alaska*, 503 U.S. 569, 591 (1992). In the present proceeding the parties have both made the same inference. Joint Statement 15-16.

It is agreed that the coordination provisions of the regulation were not followed with respect to the ARCO pier extension. The Corps did not submit the matter to the Solicitor of the Department of the Interior for comment on the effect on the federal-state boundary, and there was no coordination with the Attorney General. Joint Statement 15-16. In the United States' view, the Corps of Engineers thus violated its own regulations in issuing the permit, and, "[b]ecause of this violation, the boundary of the State's submerged lands cannot be deemed to have changed." USB 48-49.

are exceptions where there are islands or low-tide elevations off shore. (See the Submerged Lands Act, 67 Stat. 29, U.S. Code section 1301(c), and *United States v. California*, 381 U.S. 139 (1965), 382 U.S. 448 (1966)). All applications for structures or work affecting coastal waters will therefore be reviewed specifically to determine whether the coast line or baseline might be altered. If it is determined that such a change might occur, coordination with the Attorney General and the Solicitor of the Department of the Interior is required before final action is taken. The District Engineer will submit a description of the proposed work and a copy of the plans to the Solicitor, Department of the Interior, Washington, D.C. 20240, and request his comments concerning the effects of the proposed work on the outer continental rights of the United States. These comments will be included in the file of the application. After completion of standard processing procedures, the file will be forwarded to the Chief of Engineers. The decision in [sic] the application will be made by the Secretary of the Army after coordination with the Attorney General.

33 C.F.R. § 209.120(g)(10) (1976); 40 Fed. Reg. 31,322 (July 25, 1975). The current version of the regulation is essentially the same. 33 C.F.R. § 320.4(f) (1994).

There are serious problems with this argument. First, it is by no means clear that the regulation was in fact violated. Under the regulation, the Secretary of the Army was responsible for making the decision on ARCO's permit application. As Alaska points out, the Trans-Alaska Pipeline Authorization Act directed federal officers and agencies to issue permits "necessary for or related to" the operation of the pipeline system, and it permitted such officers and agencies to "waive any procedural requirements of law or regulation which they deem desirable to waive in order to accomplish the purposes of" the Act. 43 U.S.C. § 1652(b)-(c), *supra* note 11. Under these provisions, the Secretary of the Army would have been justified in issuing the permit without following all the regulatory requirements, such as the requirements that there be coordination with the Solicitor of the Interior Department and the Attorney General regarding the effect of construction on submerged lands rights.

It is unknown whether the Secretary or his subordinates actually intended to invoke the statutory waiver provisions.¹⁴ The record at this point is weak. It includes a lengthy teletype, dated December 12, 1975, from the District Engineer in Alaska to the Chief of Engineers in Washington, reviewing all the circumstances and ending with the following recommendation:

Based on the proposed project's impact on the trans-Alaska pipeline projected start-up and crude oil throughput, national interest, agency input and the applicant's exploration of alternatives, it is our recommendation that the Alaska District Engineer be authorized to issue emer-

¹⁴ Besides the statutory waiver provisions, it might also be argued that the usual requirements were relaxed by the portion of the regulation governing emergency processing of permit applications. 33 C.F.R. § 209.120(i)(2)(viii) (1976), 40 Fed. Reg. 31,322 (July 25, 1975), quoted *supra* note 12.

gency approval of the revised plan to construct the proposed gravel dock extension to include the special conditions agreed to and requested by the federal and state agencies involved.

Ak. Ex. 119. The response to this teletype, as given by officials in Washington, is described only in an informal memorandum to the file written by Corps of Engineers employees in Alaska. Ak. Ex. 120. According to the memorandum, the Washington office of the Corps of Engineers gave its concurrence by telephone on December 15, 1975, upon receiving assurances that several federal agencies were in agreement.¹⁵ There is no mention of the Attorney General, with respect to a waiver or otherwise; but a waiver of the coordination requirement by the Secretary of the Army would not necessarily come up in a conversation with the District Engineer's office. The outcome on December 15 was that the Alaska office of the Corps was to notify ARCO to proceed.

The Pipeline Authorization Act does not prescribe any particular method for waiving procedural requirements. I assume that it requires no formality to effect a waiver; to hold otherwise would be to add new procedural requirements in order to get rid of others. The decision to issue the permit is entitled to a presumption of regularity. *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402, 415 (1971). On the administrative record before me, I cannot conclude that

¹⁵ The agencies named were the Environmental Protection Agency, the National Marine Fisheries Service, the United States Fish and Wildlife Service, the Coast Guard, and the Alaska Pipeline Office in the Interior Department. The memorandum also states the concurrence of an individual described as "Interior's General Counsel." It is the Master's understanding that this person was employed in the Solicitor's office in a section other than the one concerned with submerged lands rights and Corps of Engineers permits.

the Secretary acted in violation of the regulations rather than waiving them in compliance with law.

If it is assumed, contrary to the preceding discussion, that there was a violation of regulations in issuing the permit to ARCO, then there is a different problem with the United States' position. In the *Louisiana Boundary Case*, 394 U.S. 11 (1969), the Court considered an artificially created spoil bank that was said to have been unauthorized:

[T]o the extent that the spoil bank is an extension of the mainland and is uncovered at low tide, it must be taken into account in drawing the baseline under Article 3.

The United States contends that the spoil bank should be ignored because its construction was unauthorized; it was created by the Gulf Refining Co. under a 1956 permit which, it is said, authorized the dredging of a channel but not the creation of a spoil bank. Even assuming that the creation of the bank was not authorized (a question on which we express no opinion whatever), it would not follow that it does not constitute part of the coast. If the United States is concerned about such extensions of the shore, it has the means to prevent or remove them. See *United States v. California*, 381 U.S. 139, 177. Nor can we accept the United States' argument that a "mere spoil bank" should not be deemed part of the coast because it is not "purposeful or useful" and is likely to be "short-lived." It suffices to say that the Convention contains no such criteria.

Id. at 41 n.48. Thus, a wholly unauthorized construction extends the coastline, just as a properly authorized construction extends the coastline if no state disclaimer is obtained. As Alaska observes, it would be anomalous to conclude that an improperly authorized construction does not. Tr. 2500-01.

The United States seeks to distinguish the *Louisiana Boundary Case* as not involving the actions of a federal

agent. Tr. 2453-54. It begins from the proposition that federal agencies are bound by their own regulations. There is ample authority to this effect. Thus, in *United States v. Nixon*, 418 U.S. 683, 695 (1974), the Court said of a regulation whose effect was disputed, "So long as this regulation is extant it has the force of law." However, the Court emphasized the uniqueness of that case, *id.* at 691, 694, 697, and its facts have no parallel here.¹⁶ The situation here is also quite different from that in other cases invoking the proposition. Typically in such cases, a party is disadvantaged by some Government action and seeks to have the action set aside because of the Government's failure to follow its own rules.¹⁷

¹⁶ The regulation in question delegated certain authority of the Attorney General to a Special Prosecutor, who sought to use this authority to compel the President to produce tape recordings and documents for use in a criminal prosecution. The Court relied on the regulation in finding that there was a justiciable controversy and not merely a dispute within the Executive Branch amounting to a political question. 418 U.S. at 692-97.

¹⁷ For example, in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the Board of Immigration Appeals had denied an application by a deportable alien for suspension of deportation. The alien was held entitled to a new hearing because the Board, in reaching its prior decision, had violated a regulation by failing to exercise its independent discretion. Similarly, the Court has held that government employees may not be dismissed without following applicable regulations. *Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

Not every violation, however, provides grounds for relief. In *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), certain carriers protested when the Interstate Commerce Commission granted temporary operating authority to another carrier, American Farm Lines. The grant was made without all the supporting information called for by the regulations, but the Court upheld the ICC's action. In *United States v. Caceres*, 440 U.S. 741 (1979), an Internal Revenue Service agent recorded conversations with a taxpayer in violation of IRS regulations. The taxpayer was then prosecuted for bribing the agent, with the recordings offered as evidence. The Court held them admissible. In *Sullivan v. United States*, 348 U.S. 170 (1954), a taxpayer challenged his in-

Here, it is the United States itself that complains of the Government's action; no other party was adversely affected. In addition, the United States does not ask that the action be set aside (as by voiding the Corps of Engineers permit to ARCO). It asks only that the normal consequence of the action (the extension of the coastline to follow the new construction) be avoided.

In support of this result the United States introduces a second proposition: that the unauthorized act of a federal employee cannot be deemed to have alienated a federal property interest. Hence, the United States reasons, the issuance of the Corps of Engineers permit to ARCO cannot be deemed to have led to the loss of any federal submerged lands. For this argument it cites cases such as *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (government not bound by agent's misstatement that crop was insurable) and *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1916) (government not bound, notwithstanding agreement of its agents, to tolerate unauthorized use of federal lands for electric power works). In general these cases involve unsuccessful claims that the United States is estopped from disavowing some position taken by a federal employee.¹⁸ Within this line of cases, the one factually

dictment and conviction for filing fraudulent tax returns. Contrary to a Department of Justice rule, the United States Attorney had presented the evidence to the grand jury without authorization from the Attorney General's office in Washington. The Court held the indictment valid, calling the rule "simply a housekeeping provision." 348 U.S. at 173.

See generally 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.5 (3d ed. 1994); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own "Laws,"* 64 Tex. L. Rev. 1 (1985).

¹⁸ For an extensive recent review of the cases, see *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (concluding, as to monetary claims, that to permit estoppel against the Government would violate the Appropriations Clause).

closest to the present situation appears to be *United States v. California*, 332 U.S. 19 (1947). There the Court said:

Nor can we agree with California that the Federal Government's paramount rights [in the three-mile belt] have been lost by reason of the conduct of its agents. . . . [I]n [a] substantial number of instances . . . the Government acquired title from the states to lands located in the belt; some decisions of the Department of Interior have denied applications for federal oil and gas leases in the California coastal belt on the ground that California owned the lands. . . . Assuming that Government agents could by conduct, short of a congressional surrender of title or interest, preclude the Government from asserting its legal rights, we cannot say it has done so here. . . . And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

332 U.S. at 39-40.

Here, in contrast to the cases cited, no estoppel is asserted against the United States. The question is only what remedy is available to it (assuming that the Corps's issuance of the permit to ARCO was not authorized). Despite the Court's broad language in the *California* case, I believe that the United States' position should not be accepted here. The remedy it proposes would not simply restore the United

States to the same position as if the regulation had been followed; it would make it more than whole. What it lost by the violation, if there was one, was an opportunity to negotiate with Alaska for a disclaimer of additional submerged lands. What it now seeks is the result of a successful negotiation. But there is no way of knowing whether Alaska would have agreed to that result.¹⁹ Moreover, the lands in question are not irrevocably lost to the United States, for all agree that the Corps of Engineers can restore the coastline by ordering removal of the pier extension. See *supra* note 4 and accompanying text.

D. Conclusion

I have found that the ARCO pier extension forms part of the coast under Articles 3 and 8 of the Convention. I have also found that the determination of Alaska's coastline under the Submerged Lands Act should follow the Convention, notwithstanding the special circumstances of the pier extension. I therefore recommend that question 6 be answered in favor of Alaska, that is, that the extension of the ARCO pier constructed in 1976 should be considered a part of the mainland for the purposes of measuring the three-mile Submerged Lands Act grant to Alaska.

¹⁹ In October 1975, when ARCO first applied to Alaska for permissions concerning the pier extension, Alaska turned ARCO down. See U.S. Ex. 75. ARCO reapplied, U.S. Ex. 75, and on December 5, 1975, the State finally agreed to issue letters of nonobjection regarding the pier extension to both ARCO and the Corps of Engineers. U.S. Ex. 76. The agreement included seven paragraphs of conditions imposed on ARCO. U.S. Ex. 76.

VII LOW-TIDE ELEVATIONS

By Article 11 of the 1958 Convention, a low-tide elevation is "a naturally formed area of land which is surrounded by and above water at low-tide but submerged at high tide." Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205. A low-tide elevation generates a belt of territorial sea if it is close enough to "the mainland or an island." *Id.* The Court has used Article 11 in determining what submerged lands around low-tide elevations were granted to the states by the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988). *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 40-47 (1969).

Question 14 concerns the status of several features as low-tide elevations:

Are certain geographic features within the Beaufort Sea, which appear on nautical charts published by the federal government but not on maps prepared by the State of Alaska in 1981 and 1982, to be deemed low-tide elevations and thus salient points from which the submerged-lands grant to Alaska is to be measured?

Apparently all the features are close enough to shore that, if they are low-tide elevations, they do carry a belt of territorial sea and a grant to Alaska under the Submerged Lands Act.¹

¹ The particular features are described as follows:

There are six areas along the north coast of Alaska where such features, if they are treated as low-tide elevations (or, *a fortiori*, as islands) will affect the seaward boundary of the State of Alaska. The first lies just west of Pogik Point. There, two small shoals are shown on the NOS charts as low-tide elevations approximately one-half mile from the mainland. If these features are deleted as salient points from which the outer boundary is delimited, the area belonging to the State of Alaska would be diminished by approximately 800 acres. The sec-

In the statement of contentions that accompanied question 14, Alaska took the position that the National Ocean Service charts, which show the features, should be controlling. The United States argued for the use of Alaska's maps, which did not show them. In part it argued that Alaska's maps, derived from aerial photography in 1981 and 1982, were based on more recent information than the federal charts.

Since these contentions were presented, the United States and Alaska have made a joint survey of the relevant areas. They now agree that the features referred to in question 14 do not exist, and they have entered a stipulation (appendix E) that question 14 may therefore "be answered in the negative without the need for further proceedings before the Special Master."²

I agree that the joint survey and stipulation are sufficient to answer question 14 in the negative. I therefore recom-

ond area is a mudflat shown on NOS charts extending north of an island just east of Pogik Bay. The effect of this feature on the area of submerged lands is approximately 200 acres. The third area is approximately 5 miles east of Pogik Bay, and consists of two features approximately one-half mile from the mainland. Approximately 1100 acres are affected by the legal treatment of these features. The fourth area is one shown on the NOS charts as a low-tide elevation approximately one mile east of Cape Halkett. This feature has an effect of approximately 2,000 acres on the outer boundary of the State of Alaska. The fifth feature is a shoal approximately 3 miles east of Atigaru Point. Upon the status of this feature depends the title to approximately 15,000 acres of submerged land. Finally, the sixth area consists of the barrier islands east of the mouth of the Canning River. These features are shown on NOS chart No. 16045 between longitude 145° 30' 43" W. and 145° 34' 34" W. A substantial area of submerged land is determined by the status of the features.

Second Supplement to Joint Statement at 3-4.

² The stipulation also identifies twelve other features, not referred to in question 14, whose existence as low-tide elevations the joint survey did establish. See appendix E.

mend that the features referred to by question 14, *see supra* note 1, are not to be deemed low-tide elevations and thus are not salient points from which the submerged-lands grant to Alaska is to be measured.

PART TWO FEDERAL RESERVATIONS

VIII

THE NATIONAL PETROLEUM RESERVE-ALASKA

For some parts of Alaska's Arctic coast, determining federal and state rights in submerged lands requires more than locating the coastline under the Submerged Lands Act and measuring a three-mile belt outward from the coastline. Where the United States has created federal reservations in coastal areas, the parties' rights depend also on the effect of the reservation. For example, reserved lands may fall within the exception to the Submerged Lands Act grant to the states provided for lands "expressly retained by . . . the United States when the State entered the Union." Submerged Lands Act § 5(a), 43 U.S.C. § 1313(a) (1988).

The National Petroleum Reserve-Alaska is one area where the scope and effect of a reservation are in question. The Reserve, comprising some 23 million acres withdrawn from the public domain, was created in 1923 by Executive Order 3797-A and was originally called Naval Petroleum Reserve No. 4.¹ Its seaward boundary runs along the Arctic

¹ The Order reads:

EXECUTIVE ORDER 3797-A

ESTABLISHING NAVAL PETROLEUM RESERVE NO. 4

WHEREAS there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast and,

WHEREAS the present laws designed to promote development seem imperfectly applicable in the region because of its distance, difficulties, and large expense of development and,

WHEREAS the future supply of oil for the Navy is at all times a matter of national concern,

NOW, THEREFORE, I, WARREN G. HARDING, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby set apart as a Naval Petroleum Reserve all of the public lands within the following described area not now covered by valid entry, lease or application:

Ocean from Icy Cape at the west to the mouth of the Colville River at the east. See figure 1.1.

Three questions in the Joint Statement and Supplement relate to the seaward boundary of the Reserve. Question 7 concerns the boundary at Smith and Harrison Bays; question 8, the boundary at Peard Bay. Question 11 asks whether the boundary crosses the openings of various other inlets, bays, and river estuaries. The parties are in agreement with respect to question 7 but not questions 8 and 11.

The Executive Order, *supra* note 1, describes the boundary of the Reserve in relevant part as follows:

Commencing at the most northwestern extremity of the point of land shown on the maps of Alaska as Icy Cape, approximately lat. $70^{\circ} 21'$, long. $161^{\circ} 46'$; thence extending in a true south course to the crest of the range of mountains forming the watershed between the Noatak River and its northern tributaries and the streams flowing into the Arctic Ocean; thence eastward along the crest of this range of mountains to a peak at the head of the northernmost of the two eastern forks of Midas Creek (Pl. 1, U.S.G.S., Bull. 536), at approximately lat. $67^{\circ} 50'$, long. $156^{\circ} 08'$; thence in a true north course to a point at the highest high water on the western or right bank of the Colville River; thence following said highest highwater mark downstream along said Colville River and the western bank of the most western slough at its mouth to the highest highwater mark on the Arctic coast. From here, following the highest highwater mark westward to the point of beginning.

The coast line to be followed shall be that of the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore, except in the case of Plover Islands, from Point Tangent to Point Barrow (Pl. 3, U.S.G.S., P.P. 109), long. approximately $154^{\circ} 50'$, where it shall be the highest highwater mark on the outer shore of the islands forming the groups and extending between the most adjacent points of these islands and the sandspits at either end. In cases where the barrier reef is over three miles off shore the boundary shall be the highest highwater mark of the coast of the mainland.

Said lands to be so reserved for six years for classification, exami-

Commencing at the most northwestern extremity of the point of land shown on the maps of Alaska as Icy Cape, . . . [thence south, thence east, thence north] to a point at the highest high water on the western or right bank of the Colville River; thence following said highest highwater mark downstream along said Colville River and the western bank of the most western slough at its mouth to the highest highwater mark on the Arctic coast. From here, following the highest highwater mark westward to the point of beginning.

The coast line to be followed shall be that of the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore, except in the case of Plover Islands, from Point Tangent to Point Barrow (Pl. 3, U.S.G.S., P.P. 109), long. approximately $154^{\circ} 50'$, where it shall be the highest highwater mark on the outer shore of the islands forming

nation, and preparation of plans for development and until otherwise ordered by the Congress or the President.

The reservation hereby established shall be for oil and gas only and shall not interfere with the use of the lands or waters within the area indicated for any legal purpose not inconsistent therewith.

WARREN G. HARDING

The White House

February 27, 1923

Exec. Order No. 3797-A, *microformed on Presidential Executive Orders*, Nos. 1-7403, reel 6 (Library of Congress Photoduplication Serv.), *reprinted in Joint Statement 18a-20a*.

In 1945, Acting Secretary of the Interior Abe Fortas deleted the penultimate paragraph, which limited the reservation to six years and until otherwise ordered. Public Land Order 289, 10 Fed. Reg. 9479 (1945). By 1976 legislation the Reserve was transferred to the Secretary of the Interior and renamed the National Petroleum Reserve in Alaska. Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, § 102, 90 Stat. 303 (codified as amended at 42 U.S.C. § 6502 (1988)).

the groups and extending between the most adjacent points of these islands and the sandspits at either end. In cases where the barrier reef is over three miles off shore the boundary shall be the highest highwater mark of the coast of the mainland.

Hearings on questions 7, 8, and 11 were held on July 28 and 29, 1980. The issue of question 11 first arose at these hearings, Tr. 254-59, 268-69, 273, and was subsequently incorporated in a Supplement to the Joint Statement filed in September 1980. Post-trial briefs and reply briefs were filed in November 1980 and February 1981.

Thereafter, the issues were broadened. In the original Joint Statement, the parties had agreed that

The only question before this Court is the location of the seaward boundary of the Reserve, which concededly includes some submerged lands. It is agreed that whatever submerged lands are within the Reservation do not belong to Alaska, having been effectively withheld from the grant to the State at the time of its admission to the Union under both the *Pollard* doctrine and the Submerged Lands Act.

Joint Statement 17.²

In 1981, however, the appropriateness of this concession by Alaska was cast into question. The occasion was the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), which concerned a navigable river in an Indian reservation created while Montana was still a territory. The Court held that the riverbed had not been conveyed to the Indians but passed to Montana at statehood. After the *Montana* decision, Alaska asserted that it owned the sub-

² The *Pollard* case said that new states, upon their admission to the Union, receive title to the land beneath navigable waters within their boundaries. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). For general background see *supra* section II.

merged lands underlying tidal lagoons within the exterior boundary of the Reserve.

The United States disagreed, but it joined with Alaska in a stipulation and a joint motion, dated November 2, 1983, and October 31, 1983, respectively, requesting an order relieving Alaska from its concession and permitting briefs on the relevance of *Montana* to "tidal lagoons" within the Reserve boundary. The joint motion also sought leave for the submission of new documentation on question 8. The Master granted the joint motion on January 4, 1984.³ The parties submitted their supplementary documentation on question 8 in January 1984. Ak. Exs. 143-145; U.S. Exs. 94-95. They filed supplemental briefs and reply briefs in January and February 1984. Final argument was held on March 4, 1985. At this proceeding the parties agreed that the Master should consider the application of *Montana* to all tidal areas within the Reserve, regardless of whether such areas constitute lagoons.⁴ Tr. 2431-32, 2477.

In *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), the Court again analyzed the relation between prestatehood federal actions and a state's interest in submerged lands. It again decided in favor of the State, following *Montana* and stating that it would "not lightly infer a congressional intent to defeat a State's title to land under navigable waters." 482 U.S. at 197. Because of *Utah*, the

³ The motion, stipulation, and the Master's order also covered the relevance of *Montana* to the Arctic National Wildlife Refuge, discussed *infra* in section IX. Similarly, the parties' agreement of March 4, 1985, mentioned below, applied to the Wildlife Refuge as well as the Petroleum Reserve.

⁴ The Master is informed that the application of *Montana* to nontidal navigable inland waters in the Reserve is being litigated in the federal district court. *Alaska v. United States*, Civ. Nos. A83-343, A84-435, and A86-181 (D. Alaska, consolidated and stayed pending resolution of the present case).

Parties' contentions regarding Questions 7, 8 and 11, and regarding the effect of
Utah v. United States and Montana v. United States.

PANEL 2



Figure 8.2

Parties' contentions regarding Questions 7, 8 and 11, and regarding the effect of
Utah v. United States and Montana v. United States.

PANEL 3

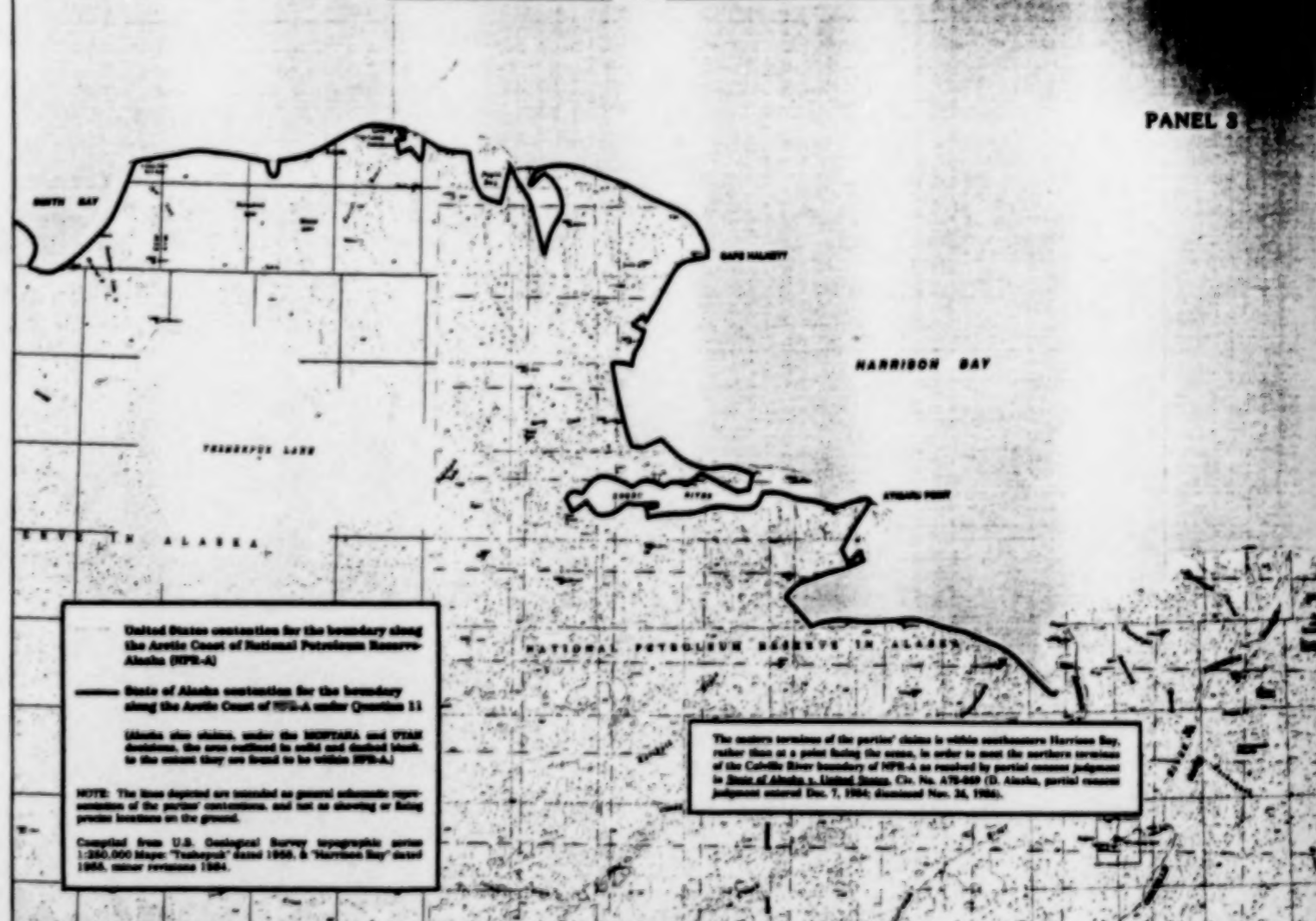


Figure 8.3

A. Question 7: Harrison Bay and Smith Bay

Question 7 asks:

Are Harrison Bay and Smith Bay part of National Petroleum Reserve-Alaska?

The parties agree that, if Harrison and Smith Bays are not part of the Reserve, the lands beneath the inland waters of these bays passed to Alaska in 1959, at its statehood, under the Submerged Lands Act.

Question 7 arises because, in 1972, the Department of the Navy issued a notice purporting to delineate the seaward boundary of the Reserve and to place Harrison Bay and Smith Bay inside the boundary. Notice of Boundary Description of Naval Petroleum Reserve No. 4, 37 Fed. Reg. 10,088 (May 19, 1972) (Ak. Ex. 90). *See also* U.S. Exs. 87-91 (maps depicting the 1972 boundary).⁶

⁶ The need for a precise definition of the northern boundary of the Reserve was recognized in 1969. *See* Ak. Ex. 87, a letter of July 1969 from the Navy to the Bureau of Land Management, which states in part:

The northern sea and shore boundaries of Naval Petroleum Reserve No. 4, Alaska have never been delineated on nautical charts since its establishment in 1923.

Due to the increasing tempo of oil and gas activities on the North Slope of Beaufort Sea, it is necessary that the north boundary of Naval Petroleum Reserve No. 4 be marked on the pertinent nautical charts.

... It appears that we have a common interest in the location of this boundary because of the possibility of the existence of unreserved public lands north of Petroleum Reserve No. 4. ...

... We ... would appreciate it if you would undertake to lay down the boundary on nautical charts as the line is described in Executive Order No. 3797A.

In October 1969, the Navy entered into a contract with the Arctic Institute of North America, authorizing the Institute to conduct a study of boundary and land-status problems of the Reserve. Ak. Ex. 102, *infra*, at 1. The report was submitted in 1971. Stewart French & John C. Reed,

The parties agree that the 1972 Notice is ineffective to defeat rights acquired by Alaska in 1959 and that the 1923 Executive Order contains the controlling description. Joint Statement 17. Except at the Plover Islands, the Order expressly encompasses offshore areas only if they are "small lagoons" shoreward of "sandspits and islands forming the barrier reefs" and if these reefs are not more than three miles offshore.

I agree with the parties that the Order does not encompass Harrison Bay or Smith Bay. It is apparent from the maps that the language quoted does not include them, *see* figure 1.1, and the Order provides no other basis for their inclusion. The same conclusion is supported by testimony of Dr. Robert Smith, a geographer in the Department of State and an expert witness for the United States. Dr. Smith noted the geographical differences between Harrison and Smith Bays, where there are no barrier reefs, and Peard Bay, which the United States contends in question 8 is inside the boundary because of its barrier formations. Tr. 203-04, 249. Dr. Smith's opinion was that Smith Bay and Harrison Bay are not in the Reserve. Tr. 223, 237.

The parties have asked for a recommended decree con-

Boundaries and Status of Naval Petroleum Reserve No. 4 (Arctic Inst. of N. Am., July 1971) (Ak. Ex. 102); *id.* (rev. & expanded Sept. 1971) (Ak. Ex. 103). French and Reed viewed the problem of fixing the Reserve's seaward boundary as similar to the problem of fixing a state's coastline for the purpose of the Submerged Lands Act of 1953. They suggested drawing the boundary across bays from headland to headland on the basis of their reading of the Court's Submerged Lands Act decisions, particularly *United States v. California*, 381 U.S. 139 (1965), and *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11 (1969). Ak. Ex. 103 at 25-28, 44-45, 82. The Navy's own Notice of Boundary Description, however, purported to rely only on the 1923 Executive Order as justifying the inclusion of Harrison and Smith Bays in the Reserve. 37 Fed. Reg. at 10,089 n.5.

firming Alaska's title to the submerged lands underlying Harrison Bay and Smith Bay. They note that Alaska is entitled to security of title, that the United States at one time claimed these areas, and that the Navy Department's boundary description notice has never been withdrawn. Joint Statement 17.

I see no objection to making such a recommendation, subject to two points noted below. The Court has often entered decrees defining offshore boundaries which, in whole or in part, were uncontested. *E.g.*, *United States v. Maine (Massachusetts Boundary Case)*, 452 U.S. 429 (1981); *United States v. California*, 432 U.S. 40 (1977); *United States v. Florida*, 425 U.S. 791 (1976).⁷

The extent of Alaska's rights in Smith and Harrison Bays depends on two further questions. First, the exact boundary of the Reserve inside of the bays is at issue in question 11 (*infra*, section C). Second, the rights of the parties also depend on the seaward limits of Smith and Harrison Bays. Although the parties have agreed on the seaward limits of Smith and north Harrison Bays,⁸ the seaward limit of south-

⁷ A possible justification for such action may be that no officer of the United States can make a permanently binding agreement as to offshore submerged land boundaries. *Cf.* section 7 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1336 (1988), authorizing interim agreements.

To be sure, the Court will not enter every decree the parties jointly propose. Compare *Vermont v. New York*, 417 U.S. 270, 277 (1974) (denying consent decree proposing an "arbitral" solution) with *New Hampshire v. Maine*, 426 U.S. 363 (1976) (approving consent decree as consistent with the Court's judicial function). Accordingly, the Master has independently reviewed the position with respect to Harrison and Smith Bays.

⁸ For Smith Bay, the agreed limit (approximately Cape Simpson to Drew Point) is defined by the closing line shown on the most current NOS Chart No. 16067. For the northern portion of Harrison Bay, the agreed limit (approximately Cape Halkett to Atigaru Point) is defined by the closing line on the most current NOS Charts Nos. 16064 and 16065.

ern Harrison Bay is the subject of a recommendation in question 15 (*supra*, section IV). The proposition at stake in question 7, however, is only that the Reserve boundary does not include the seaward limits of Smith and Harrison Bays. Questions 11 and 15 have no bearing on that proposition.

I therefore find, in the sense just stated, that Harrison Bay and Smith Bay are not part of the National Petroleum Reserve-Alaska and recommend that the Court answer question 7 in the negative.

B. Question 8: Peard Bay

Question 8 asks:

Is Peard Bay part of National Petroleum Reserve-Alaska?

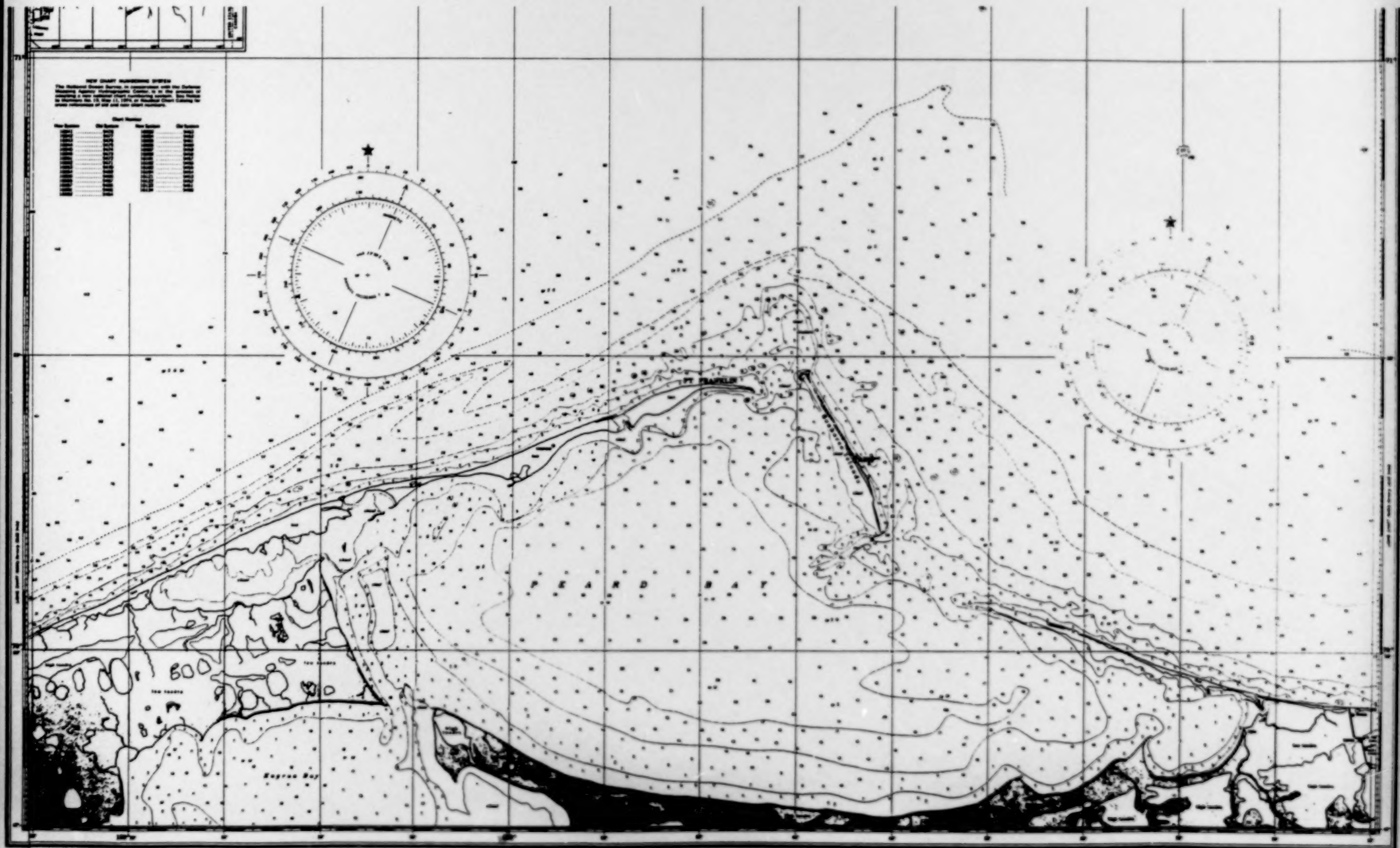
The geography of Peard Bay is shown in figure 8.4 and in NOS Chart 16084, "Peard Bay and Approaches" (Joint Ex. j, U.S. Ex. 72).

The relevant part of the boundary description in the Executive Order, *supra* note 1, reads as follows:

The coast line to be followed shall be that of the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore

....

Thus, the bay will be inside the Reserve if it qualifies as a small lagoon with appropriate barrier reefs. In Alaska's view, the description is ambiguous with respect to Peard Bay, and the drafters' intentions may therefore be illuminated with other evidence. Tr. 2486. Toward this end it has introduced numerous maps. In the United States' view, the boundary language is self-sufficient, and in any event Alaska's maps are not persuasive evidence of the drafters' intentions. I begin with the weight to be given to the maps.



1. *The early maps*

The Executive Order itself refers to two United States Geological Survey plates, one of an inland region and one of part of Alaska's north coast. The latter map is in evidence as United States Exhibit 63. Dated 1918, it of course does not show the proposed Reserve boundary. Neither does it show Peard Bay; its coverage begins east of Peard Bay near Point Barrow and the Plover Islands. The map does show many areas as unsurveyed.

Alaska refers to several other maps that predate the Executive Order and show Peard Bay. These include its Exhibit 2 (exploratory voyages, 1873-1889), Exhibit 3 (Hydrographic Office, 1882), Exhibit 6 (Alaska Road Commission, 1913), Exhibit 7 (Department of the Interior, 1917), and United States Exhibit 64 (Hydrographic Office, 1922). All these maps differ from current NOS Chart 16084 in whether and how they show the features, such as islands and sandspits, that bear on whether Peard Bay is a lagoon. Alaska sums up the situation as follows:

[E]arly maps of Alaska's north coast show[] that the islands seaward of Peard Bay generally were not depicted as long slender barrier islands enclosing the water body. Instead, they were depicted as round islands substantially seaward of the coast line, making it reasonable that the boundary as described was not intended to follow their seaward edge to enclose "small lagoons."

ASB 25. Alaska concludes that Peard Bay is excluded from the Reserve because the drafters of the Executive Order, using the maps then available, would not have considered it a lagoon.

The United States replies that it is not known what maps, other than those cited in the Order, the drafters may have used and that some of the early maps are consistent with finding Peard Bay a lagoon. In particular it cites two of

Alaska's own exhibits, Ak. Ex. 4 (U.S. Army, ca. 1883) and Ak. Ex. 5 (Department of the Interior, 1906). The United States adds that the drafters "did not appear to have available a clear definition of the coastline." USRB 19.

I follow generally the view suggested by the United States. It is clear that all these maps were prepared at a time when the actual geography was not well known. They are inconsistent not only with current NOS Chart 16084 but also with each other.⁹ The framers of the Executive Order probably understood the limitations of their geographic knowledge. They can hardly have meant for later interpretation of the Order to rest on an attempt to reconstruct their own partial and conflicting information, even after fuller knowledge became available. I conclude that the boundary language of the Executive Order should be interpreted on the basis of current geographical information.

Alaska has introduced other exhibits, however, that show not only beliefs about the geography but also a seaward boundary for the Reserve. The boundary description in the Executive Order was drawn from a letter from the Director of the Bureau of Mines to the Secretary of the Interior, dated February 7, 1923. Ak. Ex. 82.¹⁰ The letter began, "I would respectfully suggest for your consideration the creation by executive order of Naval Petroleum Reserve No. 4, as shown on the accompanying map and to be defined as follows." The map referred to was later lost.

⁹ The parties do not suggest that the coastline has itself changed over the years.

¹⁰ This is one of two known contemporary government letters supporting the creation of the Reserve. The other was written by Acting Secretary of the Navy Theodore Roosevelt (the son of the President). Ak. Ex. 83. See John C. Reed & Stewart French, *Boundaries, and Status of Land and Resources, of Naval Petroleum Reserve No. 4*, at 21-23 (Arctic Inst. of N. Am., rev. & expanded Mar. 1975) (Ak. Ex. 105). The two letters are also treated in section E(4)(b), *infra*.

Alaska has presented a map which it says may be the map referred to in the 1923 letter. Ak. Ex. 144; Ak. Ex. 145 (an enlargement of Ak. Ex. 144). The map misstates the geography of Peard Bay, but it clearly excludes the bay from the proposed Reserve boundary. Alaska contends that the map resolves "any remaining question whether the drafters of Executive Order 3797-A . . . intended Peard Bay and Wainwright Inlet to be included within [the Reserve's] exterior boundaries." ASB 23.¹¹

The map was transmitted to Alaska by Charles Hardee of the Department of the Interior. His cover letter of May 1977 called it "a map which we believe to be the elusive '1923' map. We are attempting to verify it at this time." Ak. Ex. 143. In fact the map was never verified, U.S. Exs. 94, 95, and Alaska acknowledges that "we do not know who drew the line on the map nor when it was drawn." ASRB 23.

These doubts diminish the weight of the map and the seaward boundary it shows. But even if the map had been verified as the map mentioned in the Bureau of Mines' letter, I do not believe it would be dispositive.¹² First, it is plainly not one of the two maps named in the boundary description itself. Had there been a definite intention as to how the boundary description would apply to Peard Bay and other features not named in the description, the drafters could have referred to a boundary map as well as the other plates. Second, the underlying map, like other early maps, omits some of the features of Peard Bay. The line showing Peard Bay as

¹¹ Wainwright Inlet is at issue in question 11, *infra* section C.

¹² I therefore do not reach Alaska's argument that any doubt about the authenticity of Exhibits 144 and 145 should be resolved in its favor.

Alaska also asserts that the United States has "characterized the map attached to [the] letter as the 'best evidence' on this question." ASRB 23-24, citing USRB 19. Careful reading of the United States' brief makes clear, however, that its reference was to the map referred to in the Order itself, not to the map referred to in the Director's letter.

outside the Reserve may have rested simply on mistaken beliefs about the geography. Indeed, the cover letter from the Bureau of Mines describes the entire area to be withdrawn as "largely unknown and unexplored." Ak. Ex. 82, at 2.

Alaska also relies on several editions of maps accompanying the annual reports of the territorial governors of Alaska, published in the years just after creation of the Reserve. Ak. Ex. 1. The maps for 1923 through 1931 show the Reserve boundary and place Peard Bay outside it. Alaska suggests the governors' maps deserve great weight as contemporaneous interpretations by the Federal Government. The United States replies that the governor was not authorized to determine boundaries, that the boundaries shown in different editions are conflicting, and that the maps are geographically inaccurate. It also points to Navy memoranda indicating that no determination of the seaward boundary was made until 1972 and to Interior Department maps omitting the seaward boundary. *See supra* note 6 and accompanying text.

The points made by the United States appear to be correct.¹³ The governors' maps must therefore be taken to express only unofficial opinions. Furthermore, there are discrepancies in their treatment of features other than Peard Bay. For example, the maps for 1923 through 1925 exclude

¹³ A contrary inference might be drawn from U.S. Ex. 71, which is a chart captioned "Major differences of Arctic Ocean boundary of Naval Petroleum Reserve No. 4 as between Department of the Navy F.R. description of May 19, 1972 and BLM's interpretation of E.O. No. 3797-A of February 27, 1931." The caption suggests that the Bureau of Land Management made a boundary determination in 1931. I believe, however, that the phrase "of February 27, 1931" was meant to refer to the date of the Executive Order and should have read "of February 27, 1923." The Bureau of Land Management was not created until 1946, Reorg. Plan No. 3, § 403, 3 C.F.R. 193, 196 (Supp. 1946), reprinted in 5 U.S.C. app. at 1451, 1452 (1994), and there is no evidence in the record of a 1931 boundary interpretation by its predecessor, the General Land Office.

Elson Lagoon and Dease Inlet from the Reserve even though this area, lying behind the Plover Islands, is specifically included by the Executive Order. Such errors do not inspire confidence in the preparers' opinions.

I conclude that the Reserve boundary at Peard Bay should be determined using only the language of the Executive Order and the most recent charts.

2. *The boundary description*

The Order describes the Reserve boundary as following "the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore." Peard Bay will be included in the Reserve if (1) it is a "small lagoon" with "sandspits and islands forming the barrier reefs" extending across it and (2) the "barrier reefs are not over three miles off shore." The three-mile requirement will be treated first.

a. *The three-mile requirement*

Peard Bay is formed by long sandspits at each side of the bay and two sets of islands in its mouth. *See* figure 8.4. It is clear that the sandspits and islands qualify as barrier reefs and that the sandspits, being attached to the mainland, are "not over three miles off shore." Tr. 204, 208-09, 228, 277-78. The question is how the distance to the islands is to be measured.

There are different ways of interpreting the three-mile requirement. Perhaps the most obvious would be to assume that any barrier reefs will run roughly parallel to the mainland and to require that the body of water they enclose be less than three miles across. Lagoons would thus include only narrow bodies of water such as Kasegaluk Lagoon near Icy Cape (figs. 1.1, 8.1). Such a picture is not appropriate to

Peard Bay, however, since the sandspits are attached to the mainland and swing out from it.

Off the western sandspit, which ends at Point Franklin, lie the Seahorse Islands. From Point Franklin to the first of the Seahorse Islands the distance is less than one mile. The entire group is within a three-mile radius of Point Franklin, except for the southernmost part of the southernmost island. *Cf.* Tr. 229-30. Off the eastern sandspit, there is an unnamed set of small islands at a distance of about 0.1 mile. Between the Seahorse Islands and the unnamed islands, the shortest crossing is about 3.25 miles.¹⁴

The United States' expert witness, measuring from each sandspit to the nearest islands, characterized each set of islands as within three miles of the mainland, and he concluded that the three-mile requirement was therefore satisfied. Tr. 209, 229-32. In the United States' view, the seaward boundary of the Reserve thus includes a closing line from Point Franklin to the nearest point on the Seahorse Islands and another closing line from the southeastern tip of the Seahorse Islands to the northwestern tip of the small island group just off the eastern sandspit. Tr. 221-23; Joint Ex. j.

In Alaska's view, the boundary of the Reserve follows the sinuosities of the coast around and inside of Peard Bay, leaving the waters of the bay and the barrier islands outside the Reserve. Tr. 244-45, 264, 267-71. In support of this position Alaska originally contended that, for the barrier islands to be "not over three miles off shore," they must be not over three miles from the "bottom" of the bay, that is, from the

¹⁴ These distances are based on measurements from NOS Chart 16084 (Joint Ex. j). Although there is a suggestion in the transcript that the distance between the two island groups is less than three miles, Tr. 230, the suggestion appears to be incorrect. *See also* Tr. 2440.

landward side of the bay or the part of the bay farthest from the entrance. Joint Statement 18; Tr. 243-44.

Alaska no longer holds this theory. During the hearing, counsel for Alaska stated, "[W]e in effect have abandoned the theory that the barrier islands must at all points be [no] more than three miles from the shoreline." Tr. 244; *see also* Tr. 2485. The intended statement was probably "[no] more than three miles from the shoreline [at the bottom of the bay]."

In its post-hearing brief Alaska summarized the testimony of its witness, Mr. Claud Hoffman, an expert in surveying and cartography. Mr. Hoffman "did not believe he could connect the tip of the sandspit at the eastern edge of Peard Bay with the southeastern end of the Seahorse Islands because that distance exceeds three miles" AB 30-31, citing Tr. 264-65; *see also* Tr. 288, 2482-85. The reasoning behind this point is unclear. One interpretation would be that water crossings between barrier features should not exceed three miles.¹⁵ But the Executive Order speaks to the distance of barrier formations offshore, not to the distance between them. A water crossing of more than three miles between islands is relevant not to their distance offshore but to whether Peard Bay is enough cut off from the sea to be a lagoon. That question is discussed in the next section.

Another interpretation of Alaska's point would be that the southeastern end of the Seahorse Islands is more than three miles not only from the eastern sandspit but also from any other part of the mainland. The great bulk of the area of the Seahorse Islands, however, and the whole of the small east-

¹⁵ In fact the United States' proposed boundary runs from the southeastern end of the Seahorse Islands to the islands adjacent to the eastern sandspit, not to the sandspit itself, but that distance also exceeds three miles.

ern islands, are within a three-mile radius of their respective arms of the mainland. From Point Franklin to the nearest point on the southernmost of the Seahorse Islands, the distance is about 2.75 miles; from Point Franklin to the farthest point on that island is less than 3.2 miles. In light of the inevitable irregularities of natural geographic features, I do not believe the drafters of the Order would have meant a part of a single barrier island beyond three miles to disqualify a lagoon from inclusion inside the Reserve boundary.¹⁶ Accordingly, I find that the islands in the mouth of Peard Bay meet the test of being "not over three miles off shore."

b. Peard Bay as a small lagoon

Several points have been raised as to whether Peard Bay is a "small lagoon": (1) the size of the body; (2) whether it is sufficiently separated from the sea to be considered a lagoon; and (3) the fact that it is called a bay rather than a lagoon.

There is no contention that Peard Bay is too large to be a small lagoon. Peard Bay itself comprises about 93 square miles. By way of comparison, the United States introduced evidence of the size of other lagoons. Tr. 204-206. In the Pacific, Kwajalein Lagoon is over 800 square miles in area, and Bikini Lagoon is over 200 square miles. On the Texas Gulf Coast, the Laguna Madre measures over 425 square

¹⁶ Compare George W. Skadel, *The Coastal Boundaries of Naval Petroleum Reserve No. 4*, at 15 (University of Alaska Sea Grant Program, Alaska Sea Grant Rep. No. 73-12, 1974) (Ak. Ex. 10). Skadel points out that at Kasegaluk Lagoon some parts of the reef are over three miles offshore, and he suggests that ownership is divided between Alaska and the United States. In his view the Reserve boundary runs outside the barrier islands where the lagoon is less than three miles wide but returns to the mainland where the lagoon is wider. This interpretation seems clearly untenable, for it could result in dividing lagoon beds into arbitrarily small slices, depending on the particular configuration of the barrier reefs. Even Alaska has not adopted Skadel's position on this point.

miles. In the Arctic, Elson Lagoon (which is behind the Plover Islands and so is specifically provided for in the Executive Order) is 120 square miles. Kasegaluk Lagoon, which is divided by the western boundary of the Reserve, totals 325 square miles, 85 square miles of which lie within the Reserve boundary. Tr. 206, 247-48, 250-51. On the basis of these measurements, the United States' expert witness concluded that, in the context of the Executive Order, Peard Bay could be characterized as a small lagoon. Tr. 207. Alaska does not dispute that it is small.

A contested issue is whether Peard Bay is adequately separated from the ocean to be a lagoon. The United States' witness, Dr. Smith, described a lagoon as "a body of water that is wholly or partially separated from the open sea by a narrow spit or spits of land, barrier islands." Tr. 204. He also testified that the barrier reef between a lagoon and the open sea could be submerged as much as 15 meters. Tr. 208. Alaska offered a definition of "lagoon" as "a body of water cut off from a larger body of water by a barrier beach or reef." Donald J. Orth, *Dictionary of Alaska Place Names* viii (U.S. Geological Survey Professional Paper 567, rev. 1971) (Ak. Ex. 75); Tr. 227-28, 265-66. Alaska's witness, Mr. Hoffman, testified that Peard Bay "would fit within the general definition of a lagoon" but that it has not "had an enclosure by a barrier reef." Tr. 266. He agreed, however, that barrier reefs could be submerged. Tr. 277.

Besides the sandspits and islands that partially enclose Peard Bay, there are additional areas that Dr. Smith testified formed part of the barrier reef. Between Point Franklin and the Seahorse Islands, the water is generally less than six feet deep, and part of the area is marked "shoal" on Chart 16084 (Joint Ex. j). At the east side of the bay, the sandspit and small islands beyond it are extended for nearly 1.5 miles by a narrow strip of sand that the chart indicates is submerged by one foot of water or less. Taking these areas into ac-

count, Dr. Smith concluded that seventy to eighty percent of the entrance to Peard Bay was encompassed by barrier reefs. Tr. 208-09.

Alaska contends that submerged areas may not be considered part of the enclosure of a lagoon because "the language of the Executive order specifically provides that only 'the sandspits and islands forming the barrier reefs' are to be considered." ARB 27. This argument is unconvincing. The Executive Order does speak of the "sandspits and islands forming the barrier reefs" in defining the coastline to be followed, but it does not define the term "lagoon," and it does not say that only sandspits and islands can contribute to the formation of a lagoon. Given the testimony of both witnesses that barrier formations can be submerged, I conclude that the submerged shoals may be considered.

The remaining stretches of water at the entrance to Peard Bay include two narrow channels. Between Point Franklin and the Seahorse Islands the channel has depths ranging from 7 to 13 feet. The other channel, just southeast of the Seahorse Islands, has depths from 15 to 39 feet. See Tr. 229, 266, 278-79; Joint Ex. j.¹⁷ The rest of the distance from the Seahorse Islands to the finger of barely submerged sand, about 1.7 miles, has depths of less than 12 feet.¹⁸

Alaska argues that, because of the channels, Peard Bay is not cut off from the ocean and therefore does not satisfy the definition of a lagoon in the *Dictionary of Alaska Place Names*. Channels are common features of many lagoons, however, and Alaska's witness himself did not distinguish

¹⁷ The *Coast Pilot*, published to supplement NOS charts, states that the first channel has a least depth of about four feet and that a depth of about twelve feet can be carried through the second channel. National Ocean Survey, U.S. Dep't of Commerce, 9 *United States Coast Pilot* 342 (9th ed. 1979) (Ak. Ex. 136).

¹⁸ The *Coast Pilot*, *supra* note 17, at 342, states that a depth of about eight feet can be carried into much of this area.

between the channels at Peard Bay and those at other lagoons. At Kasegaluk Lagoon, which he agreed was inside the Reserve boundary as a small lagoon, he identified channels at the Pingorarok Pass and Akoliakatat Pass entrances, both with depths comparable to those at Peard Bay. Tr. 279; Ak. Exs. 108, 109 (NOS charts 16086 and 16087).

Alaska's argument also requires too strong a definition of "lagoon." If Peard Bay were entirely cut off from the sea, it would be a lake, not a lagoon. The reference in the Executive Order to islands and sandspits indicates that the drafters certainly envisaged water connections between lagoons and the sea. I thus find that Peard Bay, being seventy to eighty percent enclosed, is adequately cut off from the sea to be a lagoon.

Finally, Alaska argues that Peard Bay should not be considered a lagoon because it is designated a bay rather than a lagoon on charts and in Orth's *Dictionary of Alaska Place Names*. The Executive Order, however, does not draw a contrast between lagoons and bays; it does not speak of bays at all. Although Peard Bay may be a bay for certain purposes, that is not inconsistent with its being a lagoon for the purpose of the Executive Order.

As for the names shown on charts, many features were named by navigators and explorers, not by geographers with precise criteria and precise charts. Peard Bay was named in 1826, long before even the earliest charts discussed above in section B(1). Ernest de K. Leffingwell, *The Canning River Region, Northern Alaska* 71 (U.S. Geological Survey Professional Paper 109, 1919), citing Frederick W. Beechey, *Narrative of the Voyage of the Blossom* (London 1831). The *Dictionary of Alaska Place Names* agrees. Orth, *supra* page 361, at 745. An expert witness for Alaska testified, in another context, that whether a water body is called a bay is entirely ad hoc and of no significance. Tr. 2770 (Harrison Bay).

3. Conclusion

Taking into account the location and nature of the barrier reefs, the size of Peard Bay, and the meaning of "lagoon," I find that the bay is a small lagoon behind appropriate barrier reefs within the meaning of Executive Order 3797-A. I therefore construe the Executive Order as including Peard Bay within the exterior boundary of the Reserve.

C. Question 11: Wainwright Inlet and the Kuk River, Kugrua Bay and River, and other small inlets, bays and river estuaries

Question 11 concerns the boundary of the Reserve at several inlets, bays, and river estuaries:

Are the submerged lands within Wainwright Inlet and the Kuk River, Kugrua Bay and River, and other small inlets, bays and river estuaries, between Icy Cape and Point Barrow and between Point Tangent and the Colville River, within the boundary of the National Petroleum Reserve—Alaska?

The positions of the parties on question 11 are shown in figures 8.1, 8.2, and 8.3 (facing page 348); the inlets named in the question all appear in figure 8.1. The stretch between Point Barrow and Point Tangent (figure 8.2) is not disputed in question 11 since that is the Plover Islands area, for which the Executive Order makes special provision.

Alaska argues that, except between Point Barrow and Point Tangent and where near-shore barrier reefs create small lagoons, the boundary of the Reserve follows the sinuities of the shore, going into bays, inlets, and river estuaries along the line of mean higher high water. Supplement to Joint Statement at 4. The United States says that the boundary follows the coastline of the Arctic Ocean and includes at least short water crossings across river mouths and

narrow-mouthed bays and inlets. *Id.* at 3. The United States' position on question 11 is in accord with the Navy's 1972 Notice of Boundary Description, *supra* page 349, except for the boundary at Smith and Harrison Bays. Tr. 223. Its position is also shown on United States Exhibits 71 (Smith and Harrison Bays) and 87–91 (all other areas).

1. The geography

The main areas in dispute are those named in question 11. Some additional areas are shown in figures 8.1 through 8.3. Still others within the scope of the arguments are too small for illustration.

The first areas mentioned in question 11 are Wainwright Inlet and the Kuk River, which drains into the inlet (figure 8.1).¹⁹ Together these constitute a long deep indentation, stretching at least thirty miles into the mainland, with a width of as much as four miles. The inlet is less than 0.2 mile wide at its mouth. *See* Tr. 279–80; Joint Exs. d, k; U.S. Ex. 84 at 11; U.S. Ex. 87; Ak. Ex. 136 at 341–42.

Also listed in the question are the Kugrua Bay and River (figure 8.1). Kugrua Bay is a formation of about four miles by eight miles, joined to Peard Bay by an opening of about 0.8 miles. *See* Joint Exs. d, j. On the basis of my finding in question 8 that Peard Bay is a small lagoon, Kugrua Bay and River are no longer at issue. The Reserve boundary runs outside of Peard Bay and therefore outside of Kugrua Bay and River as well.²⁰

Of the smaller areas where the boundary is disputed, the

¹⁹ On NOS Chart 16085 (Joint Ex. k), the first body of water is called Wainwright Lagoon and the name "Wainwright Inlet" refers to the opening into it.

²⁰ Should the Court disagree with my recommendation on Peard Bay, it would then become necessary to consider the United States' further contention that Kugrua Bay is a small lagoon in its own right.

largest is the Kogru River at Harrison Bay. This water body is about one to two miles wide and ten miles long, with an opening into the bay that is less than a mile wide. The opening is partially screened by the Eskimo Islands. See figure 8.3; Joint Ex. c; Ak. Ex. 85-920K (NOS Chart 16064); U.S. Ex. 88; Ak. Ex. 136 at 344.²¹

The figures show several other large areas as disputed, including Kasegaluk Lagoon and the Elson Lagoon-Dease Inlet-Admiralty Bay complex. Both of these are conceded to lie within the exterior boundary of the Reserve. For Kasegaluk Lagoon, Alaska's witness so drew the boundary. Tr. 274-75, 279. For Elson Lagoon, between Point Barrow and Point Tangent, the wording of question 11 excludes any dispute over the boundary. The remaining issue for these areas is the import of *Montana* and *Utah*. That issue will be discussed in section E for all the lands under tidal waters that are found to be within the Reserve boundary. As in the analysis of Peard Bay, I concentrate here on the location of the boundary.

2. Alaska's maps

The boundary of the Reserve at the disputed inlets has been argued primarily in terms of the language of the Executive Order. Alaska has also relied in part on some of the same maps considered in connection with Peard Bay.

Alaska's Exhibits 144 and 145, discussed *supra* in section B(1), are copies of a map showing a seaward boundary for the Reserve. It has been suggested but not verified that the map accompanied a draft of the boundary description, whose

²¹ Despite its name, the Kogru River is not a river. The *Coast Pilot*, *supra* note 17, at 344, describes it as "a series of connected lakes that form a 10-mile long lagoon that empties into Harrison Bay." See also section IV, *supra*, at note 66.

language was incorporated verbatim in the Executive Order. See *supra* page 355. The map does show at least part of Wainwright Inlet as outside the Reserve boundary.

Alaska's Exhibit 1, also discussed in section B(1), consists of maps accompanying the annual reports of the territorial governors of Alaska. These maps begin with the 1923 edition and run forward into the 1930s. They also show Wainwright Inlet as outside the Reserve.

For largely the same reasons that I found these maps unconvincing with respect to question 8, *supra* pages 355-57, I also find them unconvincing on question 11. With respect to Exhibits 144 and 145, even laying aside doubts of authenticity, there must have been a decision at some level against including a boundary map as part of the Executive Order. There is positive evidence that the drafters knew they did not know the details of the geography. The geography shown in all the maps is inaccurate, and the unofficial governors' maps also treat the Reserve boundary inconsistently over the years.

In addition, all the maps are on a very small scale. For those showing a scale, it is 1:5,000,000 or about 1 inch to 80 miles. As noted earlier, some of the disputed inlets are too small to be clearly illustrated even in figures 8.1 through 8.3, which are based on maps whose scale is 1:250,000. For the larger inlets, the maps fail to support Alaska's position at any disputed areas other than Wainwright Inlet and Peard Bay. At Wainwright Inlet itself, there is no indication that the boundary line continues up the adjacent Kuk River. In the case of Peard Bay, the maps that show the adjacent Kugrua Bay and River at all show them as inside the Reserve.

For the reasons just summarized, the Reserve boundary should be determined on the basis of the Executive Order and not from the maps of the period.

3. Construction of the boundary description

The boundary description in the Executive Order uses two phrases whose relationship is in controversy.²² One is "highest highwater mark"; the other is "coast" or "coast line." The United States argues that the principal reference in the description is to the coast and that the meaning of that term includes short water crossings. Alaska argues that the controlling phrase, for areas like Wainwright Inlet and the Kuk River, is "highest highwater mark."

The first paragraph of the boundary description begins with the inland boundary of the Reserve. It starts at the west with Icy Cape, goes inland, and returns to the coast on the east at the mouth of the Colville River. Specifically, the boundary follows the Colville River downstream along the highest highwater mark of the most western slough, to "the

²² The Order is quoted in full *supra* note 1. The boundary description, repeated here for convenience, is as follows:

Commencing at the most northwestern extremity of the point of land shown on the maps of Alaska as Icy Cape, . . . [thence south, thence east, thence north] to a point at the highest high water on the western or right bank of the Colville River; thence following said highest highwater mark downstream along said Colville River and the western bank of the most western slough at its mouth to the highest highwater mark on the Arctic coast. From here, following the highest highwater mark westward to the point of beginning.

The coast line to be followed shall be that of the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point, where such barrier reefs are not over three miles off shore, except in the case of Plover Islands, from Point Tangent to Point Barrow (Pl. 3, U.S.G.S., P.P. 109), long. approximately 154° 50', where it shall be the highest highwater mark on the outer shore of the islands forming the groups and extending between the most adjacent points of these islands and the sandspits at either end. In cases where the barrier reef is over three miles off shore the boundary shall be the highest highwater mark of the coast of the mainland.

highest high watermark on the Arctic coast." The first paragraph concludes: "From here, following the highest highwater mark westward to the point of beginning."

The second paragraph describes the "coast line to be followed" in certain specific cases. For the first two cases—small lagoons with barrier reefs less than three miles offshore, and the Plover Islands—the boundary runs along the outer side of the barriers. For the third case—"where the barrier reef is over three miles off shore"—the boundary is defined as "the highest highwater mark of the coast of the mainland."

In Alaska's view, AB 72, the areas disputed in question 11 are all areas where there are no offshore islands and, as a consequence, only the first paragraph of the boundary description applies. The United States, on the other hand, takes the last case mentioned in the second paragraph to cover all instances not otherwise provided for.

I agree with Alaska that the second paragraph of the boundary description is silent as to cases where no barrier reef exists. Nevertheless, it seems most unlikely that the drafters intended to treat the absence of a barrier differently from the presence of a barrier more than three miles offshore. The language used for the two situations, respectively "the highest highwater mark" (in the first paragraph) and "the highest highwater mark of the coast of the mainland" (in the second paragraph) therefore appear to be alternate expressions for the same intention.

Alaska argues, however, that the language of the second paragraph should be disregarded. Its theory is that the first paragraph gives a metes and bounds description, which calls for following the highest high water mark and makes no reference to water crossings. According to Alaska, this description is not to be varied by the second paragraph except in the particular cases there enumerated. It cites *Prentice v. Northern Pacific Railroad*, 154 U.S. 163 (1894), for the rule that

"[w]here there is a specific description by metes and bounds, other words which might generally describe the same land do not vary the specific description set out." AB 75. Alaska also takes comfort from the fact that Dr. Smith, the United States' witness, testified:

[I]f this whole area was merely a mainland with river mouths coming to it and the lagoons and bays incorporated within the mainland, probably it [the boundary description] would stop at that earlier paragraph. . . . [I]t was just the offshore features that caused the writers . . . to include that next paragraph.

Tr. 298. The United States responds that the two paragraphs of the boundary description form an integrated whole.

I do not agree with Alaska that the *Prentice* case requires the second paragraph to be disregarded entirely in the case where there are no islands offshore. As the Court in *Prentice* recognized, descriptions of land are to be read "for the purpose of ascertaining the intention of the parties." 154 U.S. at 176. It is generally agreed that specific rules of construction, such as disregarding a general description that conflicts with a metes and bounds description, are subsidiary to the intent. E.g., 6A Richard R. Powell, *The Law of Real Property*, ¶ 899[3] (rev. ed. 1988); 2 Aaron L. Shalowitz, *Shore and Sea Boundaries* 469-70 (U.S. Dep't of Commerce Pub. 10-1, 1964).²³ I conclude that both paragraphs of the boundary description may be considered in seeking its intended meaning.

The question remains whether the presence of the word

²³ Even in *Prentice* the Court did not wholly disregard the general description that plaintiff said covered the land he was suing for. Rather, it found that neither the metes and bounds description nor the general description, on a fair interpretation, described the land in controversy. 154 U.S. at 174, 176. Similarly here, the two paragraphs should be reconciled if possible, not characterized out of hand as conflicting.

"coast" in the second paragraph sheds any further light on the intention. The United States argues that the word should be understood to include short water crossings. Alaska replies that, in light of the very extensive later litigation over the meaning of "coast line" in the Submerged Lands Act, it requires "an incredible stretch of the imagination" to conclude that there was an accepted definition of these terms in 1923. ARB 29-30. The parties agree that the Order, not later practice, is controlling.²⁴

Alaska is undoubtedly correct that the meanings of "coast" and "coastline" were relatively undeveloped at the time the Order was drafted. Even at that time, however, they appear to have had the general sense of land facing on the sea, excluding at least inland areas facing only a river bank. Thus, both the 1910 and the 1933 editions of *Black's Law Dictionary* defined "coast" as the "edge or margin of a country bounding on the sea." *Black's Law Dictionary* 343 (3d ed. 1933); *id.* 210-11 (2d ed. 1910).²⁵ Similarly, the

²⁴ As the meaning of "coast line" has later developed in the context of the Submerged Lands Act, it would include closing lines across the mouths of bays and rivers in accordance with Articles 7 and 13 of the Convention on the Territorial Sea and the Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205. *United States v. California*, 381 U.S. 139 (1965).

²⁵ The full definition reads:

COAST. The edge or margin of a country bounding on the sea. It is held that the term includes small islands and reefs naturally connected with the adjacent land, and rising above the surface of the water, although their composition may not be sufficiently firm and stable to admit of their being inhabited or fortified; but not shoals which are perpetually covered by the water. *U.S. v. Pope*, 28 Fed. Cas. 630; *Hamilton v. Meniffee*, 11 Tex. 751.

This word is particularly appropriate to the edge of the sea, while "shore" may be used of the margins of inland waters.

Black's Law Dictionary 210-11 (2d ed. 1910).

1916 edition of *Webster's Collegiate Dictionary* contrasted "coast" with "shore," restricting "coast" to "the land along the sea only."²⁶

It is difficult to give "coast" or "coastline," as they are used in the 1923 Order, a sense any more technical than this. It is true that some technical content had developed in an international law context.²⁷ But the 1923 Order, designed merely to set some federal lands apart from other federal lands, would not have been thought to have international implications. Therefore, I believe that interpretation of the Order should rest not on an a priori definition of "coast" but on what the drafters would have meant to include in the Reserve given their language, their purposes, and the particular geography.

4. Application of the boundary description

a. Wainwright Inlet

The most detailed map of Wainwright Inlet (or Wainwright Lagoon, as it is called in NOS publications) is NOS Chart 16085 (Joint Ex. k). See also figure 8.1. The mouth of the inlet, as already stated, is less than 0.2 mile wide. From the southwest, the area is partly enclosed by a spit of land ending at Point Marsh. A continuation of this same spit to the south forms part of the enclosure of Kasegaluk Lagoon, which is agreed to be inside the boundary. See NOS Chart 16086 (Ak. Ex. 108). From the northeast, the area is

²⁶ "Shore is the general word for the land adjacent to the sea, a lake, or a large stream; coast denotes the land along the sea only, esp. as a boundary" *Webster's Collegiate Dictionary* (3d ed. 1916) s.v. "shore."

²⁷ For example, a sharp distinction had been made between the physical coastline and the political coastline. See *supra* section III(F)(2)(d), describing the United States' position in the Alaska boundary arbitration of 1903.

partly enclosed by a peninsula running southwest from the village of Wainwright. At the end of the peninsula is an island, whose tip is Point Collie. The island is entirely landward of the spit ending at Point Marsh. Landward of both Point Marsh and the island, there is a very narrow spit attached to the peninsula and extending south of Point Marsh by about 1.4 miles. The formations enclosing the area thus include two sandspits and one island.

The United States suggests that Wainwright Inlet is a small lagoon in the sense of the second paragraph of the boundary description. Its expert witness, Dr. Smith, testified that Wainwright Inlet is the extended mouth of the Kuk River and that he would treat it as a river closing. Tr. 294, 296-97. Alaska's expert witness, Mr. Hoffman, testified that the inlet failed to qualify as a lagoon under the second paragraph because of a channel into it. Tr. 272, 289. I have rejected a similar argument as to the effect of channels at Peard Bay, *supra* section B(2)(b).²⁸ I therefore find that Wainwright Inlet is a small lagoon with barrier reefs, formed by sandspits and islands, less than three miles offshore.

²⁸ The *Coast Pilot*, *supra* note 17, at 341-42, describes the channel and the general area as follows:

Charts 16085, 16005.—Wainwright Inlet (70°36.5' N., 160°06.5' W.), 39 miles ENE of Icy Cape, is the entrance to **Wainwright Lagoon**. The narrow winding channel between **Point Collie** on the E and **Point Marsh** on the W has a controlling depth of 6 feet at normal water level, but passage should not be attempted without the aid of local guides. Shoals extend 0.7 mile off the inlet and are well defined by breakers during moderate weather; during W storms the breakers stretch across the channel. Ice, that may enter the inlet during SW storms, follows the channel, where the current reaches a maximum velocity of about 2 knots. The mean range of tide is only about 0.5 foot.

....
Kuk River, that empties into the head of Wainwright Lagoon, has an even bottom and no definite channel. Depths decrease gradually

b. Other indentations with sandspits and islands

Along the seaward side of the Reserve there are numerous indentations that lack barrier islands but are almost wholly enclosed by spits of land attached to the mainland. Some are visible only on the largest-scale charts.²⁹ If the Reserve boundary goes across the openings to these inlets, it forms a generally smooth, continuous line in their vicinity. Under Alaska's theory, the boundary apparently follows the sinuosities of the shore into each inlet. Had the enclosing spits been separated from the mainland, becoming near-shore barrier islands, Alaska would presumably concede the inlets to be small lagoons inside the boundary.

I do not believe that the drafters could have intended such a distinction between onshore and offshore barrier features, for it would put near-lakes outside the boundary while bringing areas enclosed only by islands inside it. Rather, these inland areas appear to qualify as small lagoons with barrier reefs less than three miles offshore—in fact, not offshore at all. Even at Kasegaluk Lagoon, which is concededly inside the boundary, and at Peard Bay, which I have found to be inside the boundary, the enclosing reefs are formed in considerable part by spits attached to the mainland.

from 10 feet at the lagoon to a reported 4 feet some 30 miles up-river. . . .

²⁹ Some examples, too small to be shown as disputed in the figures, are (1) just west of Cape Halkett, where there is a formation that looks like a lake on the 1:250,000 map (U.S. Ex. 88) but which the large-scale chart shows to be not entirely closed off from the sea (NOS Chart 16065, Ak. Ex. 85-920J, at about 152°21' W.); (2) west of Pogik Bay and just west of Smith River, at the spot marked "lonely aerodrome," where the indentation is described by the *Coast Pilot* as "a large, shallow lagoon that is separated from Beaufort Sea by a narrow sand barrier" (NOS Chart 16066, Ak. Ex. 85-920I, at about 153°14' W.; *Coast Pilot*, *supra* note 17, at 344); and (3) between Cape Simpson and Fatigue Bay in two places (NOS Chart 16067, Ak. Ex. 85-920H, at about 154°35' W. and 154°41' W.).

Several of the disputed inlets do have islands at their mouths. That is true of Kugrua Bay and River, which are adjacent to Peard Bay and which the United States' witness testified form a small lagoon even if Peard Bay does not (Tr. 294-95; fig. 8.1 and NOS Chart 16084, Joint Ex. j); of Fatigue Bay, with McKay Inlet behind it, just east of Elson Lagoon (fig. 8.2 and NOS Chart 16081, Ak. Ex. 106); of Pogik Bay, between Smith Bay and Cape Halkett (fig. 8.3 and NOS Chart 16066, Ak. Ex. 85-920I); of the Kogru River, which is partly screened by the Eskimo Islands (fig. 8.3 and NOS Chart 16064, Ak. Ex. 85-920K); and of an unnamed area in south Harrison Bay, just south of Atigaru Point (fig. 8.3 and NOS Chart 16064, Ak. Ex. 85-920K). Alaska has not explained why it believes these areas fail to qualify as small lagoons within the meaning of the second paragraph of the boundary description. Except for Kugrua Bay and River, Alaska's expert witness testified from a small scale chart (NOS Chart 16003, Joint Ex. b, scale 1:1,587,870) on which the islands appeared tiny or were invisible.

I conclude that many of the disputed indentations, if not all of them, are inside the Reserve boundary as small lagoons with barrier reefs less than three miles offshore.³⁰

³⁰ I have not found that every disputed indentation qualifies for inclusion inside the Reserve boundary. For some areas the parties provided no information beyond that shown in the figures. Some of the disputed areas are too far inland to be shown on the large-scale NOS charts, and it is difficult to determine their nature from the 1:250,000 maps in evidence. Other areas, particularly at south Harrison Bay, are shown on the NOS charts, but from comparison with the smaller scale charts the Master is unable to determine precisely where the United States proposes to draw the boundary line. The Master trusts that, with the guidance of the present discussion, the parties will be able to reach agreement as to those areas.

c. *Tidally influenced parts of rivers*

If the Reserve boundary does not go across the mouth of Wainwright Inlet, there will be a serious question as to how far the boundary extends up the Kuk River. The same question arises for other rivers along the coast of the Reserve, including the Sinararuk, north of Wainwright Inlet (fig. 8.1), and the Ikpihpuk, at Smith Bay (figs. 1.1 and 8.2). Tr. 276-77, 287. These rivers raise the one issue where the use of "coast" in the second paragraph of the boundary description becomes important. See *supra* section C(3).

The United States would draw the Reserve boundary as crossing rivers at their mouths, arguing that river crossings form part of the coastline. Alaska replies that crossing the mouth of a river is a departure from the high-water mark, contrary to the first paragraph of the boundary description. It does not suggest, however, that the boundary goes inland all the way to the source of each river. Its expert witness, Mr. Hoffman, testified that he would follow the high-water line up rivers and would draw the Reserve boundary as crossing rivers at the plane of mean high water:

I would go along the mean highwater again into the river to the mean highwater, being the high-water datum that we are on, go across the river at that datum pla[ne] on that elevation and follow the same datum line along the southerly shore.

Tr. 273-74. See also Tr. 277, 286-87.

This position presents difficulties. First, it becomes impossible to determine the boundary location from charts, although it is clear that the river crossings Mr. Hoffman had in mind might be several miles inland. Cf. Tr. 196; Joint Ex. e; Tr. 169-76 (Arctic National Wildlife Refuge).

Second, the position requires conceptual clarification. Upstream, the high-water mark of a river is a line along its banks, see 2 Shalowitz, *supra* page 370, at 373, but neither

party appears to use "high-water mark" in that sense here.³¹ For the ocean, a datum like high water refers to a plane representing the height reached by the tide, and the corresponding high-water mark refers to the meeting of this plane with the land along the shore. 1 *id.* at 89. The United States, apparently referring to the physical mark left on the shore, says there is a departure from the high-water mark no matter whether the river is crossed at its mouth or farther inland. Tr. 2443-44. Alaska, on the other hand, interprets the high-water mark as the place where the tidal datum plane intersects the river.

Assuming that Alaska's interpretation of "high-water mark" is accepted, there are still difficulties with its meaning. Because river water levels vary, it is not clear how the place of intersection between the tidal datum plane and the river would be determined. Mr. Hoffman, in other parts of his testimony,³² said that he would cross rivers where salt water meets fresh, Tr. 141, 149-50, or at the limit of tidal influence, Tr. 162. The relationship of these tests to the tidal datum plane has not been clearly explained. Neither has the fact that the meeting of salt water with fresh and the limit of tidal influence both vary with the time of year. See Tr. 154-56, 161-64, 170-76, 177-78, 2503. Mr. Hoffman did indicate that the tidal datum plane is meaningful at rivers, and he said that its application at rivers, although a complex task for the surveyor, had "been accomplished on several occasions." Tr. 178; see also Tr. 174-75. However,

³¹ The phrase does occur in the sense of a line along the bank in the description of the inland boundary of the Reserve, which in part follows "said highest highwater mark downstream along said Colville River . . ."

³² Most of Mr. Hoffman's testimony on the treatment of rivers was directed to the boundary of the Arctic National Wildlife Refuge (*infra*, section IX). Although the Petroleum Reserve description uses "highest high water" and the Wildlife Refuge description uses "extreme low water," the same principles are involved in both.

neither the meaning nor the method has been further elaborated.

There is also precedent contrary to Alaska's position. *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891), involved the boundary of the city of San Francisco, which derived from rights acquired by its predecessor, the pueblo of San Francisco, under Mexican law. By a decree of the United States Circuit Court, the land was described as "a tract . . . embracing so much of the extreme upper portion of the peninsula above ordinary high-water mark . . . as will contain an area of four square leagues—said tract being bounded on the north and east by the bay of San Francisco . . ." 142 U.S. at 169. It was disputed whether this description covered land reclaimed from Mission Creek, which at the relevant time had been below high-water mark and emptied into the bay. Two surveys were made to implement the decree. The first (the Stratton survey), which was later set aside by the Secretary of the Interior, "followed the tide line up the creek, and crossing over, ran down on the other side." *Id.* at 171. The second (the Von Leicht survey), upon which a United States patent was issued, crossed Mission Creek at its mouth. *Id.* at 205 (Field, J., concurring). Although the decision turned on other grounds, the Court in dictum approved the method of the second survey, *id.* at 182, and Justice Field, in a concurring opinion, called it "the universal rule governing the measurement of waters," *id.* at 207. See also *id.* at 207–10.

Alaska suggests that its position gains support from *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), which dealt with the extent of states' rights in lands under tidally influenced waters in the absence of either a grant by a prior sovereign or any federal action to withhold the lands.³³

³³ The petitioners in *Phillips* did trace their claims to prestatehood Spanish land grants. 484 U.S. at 472. However, the Spanish land grants

The case held that lands under a bayou and certain streams in Mississippi, tidally influenced but not navigable in fact, were within the scope of the State's right to receive lands under inland waters upon statehood. See *supra* note 5. The Court indicated that a test of tidal influence, as opposed to a test of navigability, had the advantage of uniformity, certainty, and ease of application. 484 U.S. at 481. Alaska proposes that the same advantage pertains to Mr. Hoffman's test for following the high-water datum up rivers.

I reject Alaska's suggestion for two reasons. First, it is by no means clear that Mr. Hoffman's method of drawing the boundary amounts to a test of tidal influence. His method, on the record before me, promises neither certainty nor ease of application. More centrally, the question here is not what submerged lands would normally pass to Alaska at statehood but where the drafters of the Executive Order intended to draw the Reserve boundary. The boundary definition made no attempt to exclude submerged lands that might be claimed by a future state: it expressly took in small lagoons, many of which are also bays that would clearly have been subject to a state's claim to lands under navigable or tidal inland waters.³⁴ It is a separate question, to be consid-

were held invalid by the state court, and the point was not contested in the Supreme Court. *Cinque Bambini Partnership v. State*, 491 So. 2d 508, 517–18 (Miss. 1986), *aff'd sub nom. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988).

³⁴ Examples include Peard Bay and several features listed in note 29. That these would have been deemed inland waters at the time of the 1923 Order seems clear from the sources reviewed *supra* in section III(F)(2).

In the case of rivers, even the limit of tidal influence may not be the limit of submerged lands that would normally have passed to Alaska at statehood. Such lands also include the bottoms of navigable freshwater rivers. E.g., *Phillips Petroleum*, 484 U.S. at 479. Whereas it was given that the waters in *Phillips Petroleum* were not navigable in fact, the record here does not disclose whether and how far the rivers of the Petroleum Reserve are navigable beyond the limit of tidal influence.

ered in section E, whether Alaska retains the rights to such lands even though they are inside the boundary.

In light of the ordinary meaning of "coast" as excluding river banks, the difficulties in defining and locating the place where a tidal datum intersects a river, and the views expressed by the Court in the *Knight* case, I find that the Reserve boundary does not extend up rivers. For rivers whose mouths meet the boundary (rather than flowing into lagoons that are already behind the boundary), it will be necessary to draw the boundary as crossing river mouths.

5. Conclusion

A broader view of the Executive Order reinforces the conclusions of this section. It is unlikely that the drafters of the boundary description would reach out beyond the mainland to embrace lagoons formed by islands but would define the boundary elsewhere as going inside of water bodies that are even more cut off from the ocean. For the policy purpose of conserving underground petroleum resources, the relatively smooth boundary defined by small water crossings is also more appropriate than one that would follow the sinuities of the shore into small inlets and go part way up rivers. See *infra* note 68 and accompanying text.

I therefore recommend that the Executive Order be interpreted so that the following submerged lands are within the exterior boundary of the National Petroleum Reserve-Alaska:³⁵

³⁵ According to the description in the Executive Order, the highest high-water mark would be used for the endpoints of closing lines across the features listed, as well as for the parts of the boundary along the shore. It has been noted that the meaning of "highest highwater mark" is unclear. French & Reed, *supra* note 6, at 28-29 (Ak. Ex. 103); Skadel, *supra* note 16, at 10 (Ak. Ex. 10). Alaska appears to interpret it as mean

1. Wainwright Inlet and the Kuk River.
2. Kugrua Bay and River.
3. Other small inlets, bays, and river estuaries, between Icy Cape and Point Barrow and between Point Tangent and the Colville River, to the extent that they constitute either (a) small lagoons with barrier reefs less than three miles offshore, in the sense of the foregoing discussion, or (b) rivers.

D. Development of the Pollard doctrine

The seaward boundary of the National Petroleum Reserve-Alaska takes in significant areas of tidally influenced waters. Kasegaluk Lagoon and Elson Lagoon are inside agreed-on segments of the boundary; Peard Bay, Wainwright Inlet, and several other areas are inside the boundary as found in the preceding sections.

That the submerged lands of these areas lie inside the

higher high water, AB 73, which is a recognized tidal datum, 1 Shalowitz, *supra* page 370, at 87 n.11.

However "highest highwater mark" is interpreted, it would be somewhat landward of the shoreline shown on charts, which usually use the line of mean high water. *Chart No. 1, Nautical Chart Symbols and Abbreviations* iii (Dep't of Defense and Dep't of Commerce, 7th ed. 1979) (Joint Ex. a). It would also be landward of Alaska's tidelands, which are defined equivalently to begin at the line of mean high tide. Submerged Lands Act, § 2(a)(2), 43 U.S.C. § 1301(a)(2) (1988).

The difference between highest high water and mean high water is estimated to be very small, for the entire tidal range in the area, measured vertically, is only six inches. See Tr. 2445. To close the gap, the Navy's 1972 Notice of Boundary Description substituted "mean high-water mark" for "highest high-water mark." 37 Fed. Reg. 10,088, 10,089 n.5 (1972). Both parties' testimony also used the high-water mark shown on available charts. Tr. 261-62 (Alaska); see Tr. 14-15, 2445, 2447 (United States). The Master is aware of no objections to using the mean high-water mark in locating the endpoints of closing lines and the parts of the boundary along the shore.

boundary of the National Petroleum Reserve-Alaska does not of itself establish that the United States has title to the lands. When the Reserve was created in 1923, Alaska was a territory, and the general rule is that lands under navigable waters within a territory are held in trust for future states. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981).

1. Early history

The rule has its origins in *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), which concerned navigable waters in New Jersey, one of the original states. The plaintiff, suing in ejectment for lands under the Raritan River and Bay, traced his claim to rights granted to the duke of York in the seventeenth century. The defendant, who had an oyster fishery on the lands, was in possession under an 1824 New Jersey statute.

The decision turned on the construction of the original charters to the duke. These had included rights both of property and of government, but the rights of government had been returned to the Crown in 1702, leaving plaintiff's claim to rest on the rights of property. The Court, holding for the defendant, concluded that lands under navigable waters were not intended to become private property under the charters. Rather, "the shores, and rivers and bays and arms of the sea, and the land under them" were to be "held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shell-fish as floating fish" *Id.* at 413. Accordingly, the lands had been restored to the Crown with the rights of government. At independence, they then passed to New Jersey as successor to the Crown. *Id.* at 416.

In *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), the doctrine of *Martin v. Waddell* was extended to the subse-

quently admitted states. At issue were lands that, when Alabama entered the Union in 1819, had been below the high-water mark of the Mobile River. The plaintiff, suing in ejectment, claimed under a federal patent and acts of Congress, all postdating statehood.

In rejecting the claim, the Court found that the lands of Alabama had been acquired by the United States in part by cession from Georgia, an original state, in 1802 and in part through the Louisiana Purchase in 1803. *Id.* at 221, 227-28. The deed from Georgia had incorporated a provision from the Northwest Ordinance of 1787:

And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original states, in all respects whatever

An Ordinance for the Government of the Territory of the United States north-west of the river Ohio, art. V (1787), reprinted in 1 Stat. 51, 53 and in U.S.C., vol. 1, at li, liii (1994). The Court therefore concluded that the lands had passed to Alabama at statehood, just as for the original thirteen states:

Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states In the case of *Martin and others v. Waddell*, 16 Pet., 410, the present chief justice, in delivering the opinion of the court, said: "When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for

their own common use, subject only to the rights since surrendered by the Constitution."

44 U.S. at 228-29.

According to *Pollard*, Alabama was admitted to the Union on an equal footing with the original states and so, upon admission, received the rights to lands under its navigable waters. The Court has explained that the doctrine is constitutional in stature. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977); *Coyle v. Smith*, 221 U.S. 559, 565-67, 570-73 (1911) (deriving equal footing from the power of Congress under article IV, section 3, of the Constitution to admit "new States . . . into this Union").³⁶

In *Pollard*, the United States' attempt to convey submerged lands took place after Alabama's statehood. The Court indicated that, before Alabama's admission, the United States held the territory in trust for the future state. *Id.* at 222-23. In dictum, it also suggested that the United States could take no steps to defeat the passage to the states of title to land under navigable waters. *Id.* at 230; see *Utah Div. of State Lands v. United States*, 482 U.S. at 196.

The Court retracted this dictum in *Shively v. Bowlby*, 152 U.S. 1 (1894). The case considered a claim to land patented, while Oregon was a territory, under the Oregon Donation Act, ch. 76, 9 Stat. 496 (1850). The land was described as bounded on the north by the Columbia River, and the part disputed was below the high-water mark of the river. 152 U.S. at 9. The Court found that the Act contained "nothing indicating any intention on the part of Congress to depart from its settled policy of not granting to individuals lands under tide waters or navigable rivers." *Id.* at 51. It explained this policy as follows:

³⁶ See also Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 Colum. L. Rev. 929 (1995).

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community.

Id. at 49-50. Nevertheless, the Court said, Congress could have made such a grant in appropriate circumstances:

By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition.

We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States,

whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.

Id. at 48 (citations omitted). See also *id.* at 28.

2. Montana and Utah

In *Montana* and *Utah*, the Court has expanded on the conditions under which such grants will be found. *Montana v. United States*, 450 U.S. 544 (1981), involved the right of the Crow Tribe to regulate hunting and fishing within its reservation, which had been created before Montana's statehood. Second Treaty of Fort Laramie, 15 Stat. 649 (1868). The case turned in part on ownership of the bed of the Big Horn River, inside the reservation boundary. The United States sought a declaratory judgment that it owned the riverbed as trustee for the Tribe.

The Court rejected the Tribe's claim of title to the bed of the Big Horn. It stated that Congress "may sometimes convey" such lands, 450 U.S. at 551 (quoting *Shively v. Bowlby*, *supra*), but that such a conveyance will not readily be found:

[B]ecause control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon*, [295 U.S. 1, 14 (1935)], it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." *United States v. Holt State Bank*, 270 U.S. [49, 55 (1926)]. See also *Shively v. Bowlby*, *supra*, at 48. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the

United States, *United States v. Oregon*, *supra*, at 14, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," *United States v. Holt State Bank*, *supra*, at 55, or was rendered "in clear and especial words," *Martin v. Waddell*, *supra*, at 411, or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer v. Bird*, [137 U.S. 661, 672 (1891)].

450 U.S. at 552 (majority opinion by Stewart, J.).

The Court acknowledged that creation of an Indian reservation can be an "appropriate public purpose" to warrant conveyance of a riverbed, 450 U.S. at 556, but it held that the language of the Treaty was not strong enough to overcome the presumption against conveyance, *id.* at 554, and that no "public exigency" existed because the Crows "were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life," *id.* at 556. The Court distinguished its holding in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), in which conveyance of a riverbed had been found, on the basis of the "very peculiar circumstances" of that case regarding the history of the United States' relations with the Cherokee and Choctaw tribes. 450 U.S. at 555 n.5.

In *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), the dispute involved the bed of Utah Lake. It was not asserted, as in *Montana*, that the United States had conveyed the beneficial interest in the lake bed to others but rather that the United States had reserved the lake bed to itself by actions taken before Utah entered the Union in 1896.

The State of Utah acknowledged that its title to the lake bed could have been defeated by a prestatehood conveyance to a third party, but it argued that a prestatehood federal reservation of the lake bed could not have the same effect. 482 U.S. at 200-01. The Court found it unnecessary to pass upon this contention "because even if a reservation of the

bed of Utah Lake could defeat Utah's claim, it was not accomplished on these facts." *Id.* at 201. The Court then explained its approach to interpreting the effect of federal reservations:

When Congress intends to convey land under navigable waters to a private party, of necessity it must also intend to defeat the future State's claim to the land. When Congress reserves land for a particular purpose, however, it may not also intend to defeat a future State's title to the land. The land remains in federal control, and therefore may still be held for the ultimate benefit of future States. Moreover, even if the land under navigable water passes to the State, the Federal Government may still control, develop, and use the waters for its own purposes. . . .

. . . Assuming *arguendo* that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land.

Id. at 202 (majority opinion by O'Connor, J.). Holding for the State, the Court concluded, "Congress did not definitely declare or otherwise make very plain either its intention to reserve the bed of Utah Lake or to defeat Utah's title to the bed under the equal footing doctrine." *Id.* at 209.

E. Issues stemming from *Montana* and *Utah*

The parties have raised a number of issues regarding the application of *Montana* and *Utah* to the National Petroleum Reserve-Alaska:

1. Does the doctrine of *Montana* and *Utah* apply only to lands under inland navigable waters, or does it also apply to lands under the territorial sea? Alaska argues that the doctrine applies to both. The United States argues that it does not apply to lands under the territorial sea and that much of the disputed land is in that category.

2. Can a prestatehood reservation or withdrawal of lands under navigable waters, as opposed to a prestatehood conveyance to a third party, defeat a new state's title? Alaska has argued that it cannot. The United States says that it can.

3. What role must Congress play in making a reservation or withdrawal that includes lands under navigable waters? Did Congress play an adequate role in this case? Alaska urges that only Congress can defeat a state's title under the equal footing doctrine and that none of the prestatehood federal actions respecting the Reserve was an action by Congress. The United States responds that Congressional action was not necessary and that in any case Congress authorized the reservation and recognized it after the fact.

4. Did this particular reservation satisfy the *Montana* and *Utah* requirements that the intention to include submerged lands be made very plain? Did a public exigency justify their reservation? Alaska urges that the inclusion of submerged lands was not made clear and was not necessary. The United States disagrees on both counts.

5. Was there an affirmative intent to defeat Alaska's title to submerged lands? Alaska says there was not; the United States says there was.

6. If it is found that the United States retained some rights in submerged lands, did it retain the full rights of ownership? Alaska has argued that the presumption favoring the State requires the narrowest possible construction of the scope of rights retained. The United States disagrees.

I will treat these questions in the order listed.

1. *Inland waters versus territorial waters*

Montana and *Utah* dealt with the beds of navigable inland waters, namely the beds of the Big Horn River and of Utah Lake. To apply the doctrine of those cases in Alaska, it may be important to know which Alaskan waters are inland waters. In Alaska, unlike the interior states, inland waters are to be distinguished from the adjoining territorial or marginal sea.³⁷

For lands under inland waters, according to *Montana* and *Utah*, there is a strong presumption that title passed to the State when it entered the Union. Alaska says that the same presumption should apply to any territorial waters inside the Reserve boundary. The United States, to the contrary, says that for any territorial waters the presumption runs in favor of the United States. The findings in section III of this report imply that some territorial waters do exist within the Reserve boundary.³⁸

The presumption of the *Montana* and *Utah* cases is founded on the equal footing doctrine announced in *Pollard v. Hagan*. See *supra* section D. In 1947, the Court held that

³⁷ For this distinction and related background, see *supra* section II. It should perhaps be emphasized that locating the seaward limit of inland waters in the vicinity of the National Petroleum Reserve-Alaska is a separate question from locating the seaward boundary of the Reserve. Of the questions before the Master, the boundary of the Reserve is the subject of questions 7 (Smith and Harrison Bays), 8 (Peard Bay), and 11 (other inlets). The line between inland and territorial waters in the vicinity of the Reserve is the subject of questions 12 (straight baselines) and 13 (other grounds for inland waters), both *supra* section III, and question 15 (southern Harrison Bay), *supra* section IV.

³⁸ Section III concluded that waters do not become inland merely because they are landward of closely spaced barrier islands. Lagoons inside the Reserve boundary are therefore territorial waters except where there are independent grounds for finding them inland, as under the rules for drawing closing lines across the mouths of bays and rivers.

the equal footing doctrine did not entitle states to lands under the territorial sea. *United States v. California*, 332 U.S. 19 (1947). The original colonies had not separately acquired ownership of such lands, for the very idea of a three-mile belt subject to ownership was only a nebulous suggestion when the Nation was formed. *Id.* at 31-33. As to policy considerations the Court explained:

Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty. . . .

The ocean, even its three-mile belt, is . . . of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so if wars come, they must be fought by the nation. . . . Consequently, we are not persuaded to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to inland waters out into the soil beneath the ocean, so much more a matter of national concern. If this rationale of the *Pollard* case is a valid basis for a conclusion that paramount rights run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt.

332 U.S. at 34-36 (footnote and citations omitted).

Congress responded to the 1947 *California* decision by enacting the Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-1315 (1988)). By the Act, title to certain lands beneath navigable

waters was "recognized, confirmed, established, and vested in and assigned to" the states. § 3(a), 43 U.S.C. § 1311(a). In general, the lands covered included both inland waters, to which the applicability of *Pollard* had not been questioned, and a three-mile belt beyond each state's coastline. See *supra* section II.

Alaska says that Congress intended the Submerged Lands Act to extend the equal footing doctrine to lands under the marginal sea and that the presumption in the State's favor must be extended equally. As Alaska points out, the Court has recognized that Congress was seeking in the Submerged Lands Act to undo the effects of the 1947 *California* decision. *United States v. California*, 436 U.S. 32, 37 (1978). Nevertheless, the Court has also made clear that it regards the rationale of the 1947 decision as still in force. For example, the Court said in *United States v. Maine*, 420 U.S. 515, 524 (1975):

[W]e are firmly convinced that we should not undertake to re-examine the constitutional underpinnings of the *California* case and of those cases which followed and explicated the rule that paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty. That premise, as we have indicated, has been repeated time and again in the cases. It is also our view, contrary to the contentions of the States, that the premise was embraced rather than repudiated by Congress in the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. § 1301. In that legislation, it is true, Congress transferred to the States the rights to the seabed underlying the marginal sea; however, this transfer was in no wise inconsistent with paramount national power but was merely an exercise of that authority.

Accord, *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 285 (1982). See also *Oregon ex rel.*

State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 n.4 (1977) ("[T]he Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine . . ."). Thus, Alaska's rights to any lands under territorial waters within the Reserve rest not on the equal footing doctrine but only on the Submerged Lands Act.

Alaska also argues, however, that the Submerged Lands Act itself adopted a standard parallel to the standard used by the Court for inland waters in *Montana* and *Utah*. The Act excepted from the grant to the states "all lands expressly retained by . . . the United States when the State entered the Union . . ." § 5(a), 43 U.S.C. § 1313(a). The United States relies on this exception in its claim to have retained submerged lands within the Reserve boundary after Alaska's admission to the Union in 1959. In the phrase "expressly retained," Alaska construes the word "expressly" as extending the presumption of *Montana* and *Utah* to lands under territorial waters.

The Court took a different view in *California ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982). There, the United States had owned upland fronting on the Pacific Ocean, which it used as a Coast Guard reservation, from the time of California's admission to the Union in 1850. Around the turn of the century, the United States constructed jetties that caused accretions, changing formerly submerged lands to uplands. The Court held that the new uplands became the property of the United States. After rejecting an equal-footing argument by California, 457 U.S. at 285-86, the Court also rejected an argument by California based solely on the Submerged Lands Act, *id.* at 286-88. It remarked, "This reading of the Act adheres to the principle that federal grants are to be construed strictly in favor of the United States." *Id.* at 287.

Alaska argues that this statement is dictum and cannot be reconciled with the Channel Islands National Monument

Case, *United States v. California*, 436 U.S. 32 (1978). The Channel Islands case dealt with a 1949 federal reservation of lands underlying the marginal sea off Anacapa and Santa Barbara Islands. The Court held that, despite the reservation, title passed to California under the 1953 Submerged Lands Act. However, the case did not involve the exception for lands "expressly retained" by the United States, and the Court did not invoke any rule of construction.³⁹

I conclude that different presumptions apply to submerged lands inside the Reserve boundary, depending on whether the waters are territorial or inland. *Montana* and *Utah* apply to lands below inland waters. For those below territorial waters, the law is more favorable to the United States, as indicated in *California ex rel. State Lands Commission*.

It is clear, however, that the presumption of *Montana* and *Utah* applies to at least some of the disputed areas. For example, the parties agree that Peard Bay, the subject of question 8, is inland water. The United States also concedes that the rivers in the Reserve are inland waters. The tidal portions of these rivers are at issue in question 11 and under the parties' agreement at final argument, *supra* page 347.

Accordingly, I will conduct the following analysis in terms of inland water principles. If the reservation satisfies *Montana* and *Utah* as to inland waters, as I find below, then it will certainly meet the less demanding standard of the Submerged Lands Act as to territorial waters.

³⁹ The Channel Islands case dealt with a poststatehood reservation and so with a different exception to the Submerged Lands Act, covering lands that were "presently and actually occupied by the United States under claim of right." § 5(a), 43 U.S.C. § 1313(a). The Court found that the United States' only claim of right stemmed from the paramount rights doctrine of the 1947 *California* decision and that Congress had meant the exception to apply only to claims with a basis other than that doctrine.

2. Reservations or withdrawals versus conveyances

According to the history already reviewed, there is a strong presumption that a new state, upon admission to the Union, takes title to lands under its inland navigable waters. The United States has the power, however, for an appropriate public purpose, to convey the title to others during the territorial period. The Court found such a conveyance in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). It declined to find one in *Montana v. United States*, 450 U.S. 544 (1981).

The present question is whether the United States also has the power, for an appropriate public purpose, to defeat passage of title at statehood by reserving the submerged lands to itself. This question was raised but left open in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987).⁴⁰

⁴⁰ The following discussion sometimes refers to withdrawals as well as reservations of federal lands. The terminology has been explained as follows:

To "withdraw" public lands means to withhold them from settlement, sale, or entry under some or all of the general land laws for the purpose of maintaining the status quo because of some exigency or emergency, to prevent fraud, to correct surveys or boundaries, to dedicate the lands to an immediate or prospective public use, or to hold the land for certain future action by the executive or legislative branch of government. For example, a withdrawal "in aid of legislation" might suspend the operation of the public land laws with respect to specified lands until Congress could act on legislative proposals to include them in a national park or a reclamation project. A "reservation" is the immediate dedication of lands to a predetermined purpose and includes, in effect, a withdrawal.

U.S. Public Land Law Review Comm'n, *One Third of the Nation's Land* 42 n.1 (1970). Other writers have noted that the terms "withdrawal" and "reservation" are often used interchangeably. Charles F. Wheatley, Jr., *Study of Withdrawals and Reservations of Public Domain Lands*, at A-1 (U.S. Public Land Law Review Comm'n, 1 Background Studies, 1969 & photo. reprint); Memorandum from Assistant Solicitor, Fish and Wildlife,

Before the decision in *Utah*, Alaska argued:

The Court has never held, or even intimated, that a federal withdrawal or reservation of submerged lands underlying navigable waters—as opposed to a conveyance—will defeat a state's title under the equal footing doctrine.

....

Requiring that such lands be conveyed by the United States prior to statehood before a new state's title is defeated is the direct result of the principles underlying the equal footing doctrine: the close identification between dominion—i.e., ownership—over such lands and the exercise of local sovereignty. Because this ownership is so closely identified with sovereignty, retention by the Federal Government of ownership necessarily would diminish the sovereignty of a newly-admitted state, violating the principle underlying the equal footing doctrine that every state's sovereignty constitutionally must be equal to the sovereignty of its sister states. In other words, a federal reservation of ownership of submerged lands would constitute a direct infringement of a state's constitutional right to be admitted to the Union on an equal footing with other states.

ASB 14-16. After *Utah* Alaska maintained this position, A 2d SB 8-9, but did not develop it further.

The United States originally responded that there is no justification in principle for treating a withholding with less favor than a conveyance. It cited several precedents as upholding prestatehood reservations of submerged lands, and it argued that the Submerged Lands Act countenances such reservations. Later, the United States read *Utah* as intimat-

to Division of Refuges, Fish and Wildlife Service (Apr. 1, 1977) (Ak. Ex. 139).

ing, although not deciding, that such reservations were permissible.

I begin with the Court's own statement in *Utah*:

The State of Utah contends that only a conveyance to a third party, and not merely a federal reservation of land, can defeat a State's title to land under navigable waters upon entry into the Union. Although this Court has always spoken in terms of a "conveyance" by the United States before statehood, we have never decided whether Congress may defeat a State's claim to title by a federal reservation or withdrawal of land under navigable waters. In *Shively*, this Court concluded that the only constitutional limitation on the right to grant sovereign land is that such a grant must be for a "public purpos[e] appropriate to the objects for which the United States hold[s] the Territory." 152 U.S., at 48. In the Court's view, the power to make such a grant arose out of the Federal Government's power over Territories under the Property Clause of the United States Constitution, which provides:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2.

The Property Clause grants Congress plenary power to regulate and dispose of land within the Territories, and assuredly Congress also has the power to acquire land in aid of other powers conferred on it by the Constitution. Under Utah's view, however, while the United States could create a reservoir site by granting title to Utah Lake to a private entity, the United States could not accomplish the same purpose by a means that would keep Utah Lake under federal control. We need not decide that question today, however, because even if a reservation of the bed

of Utah Lake could defeat Utah's claim, it was not accomplished on these facts.

482 U.S. at 200-01.

Given that the Property Clause "grants Congress plenary power to regulate and dispose of land within the Territories," it seems clear that the congressional power to retain land is as broad as the power to dispose of it. Indeed, Justice White, writing for the dissenters in *Utah*, said:

I am confident that Congress has the power to prevent ownership of land underlying a navigable water from passing to a new State by reserving the land to itself for an appropriate public purpose

The Property Clause of the Constitution, Art. IV, § 3, cl. 2, is the source of the congressional power. . . . [T]here is no reason to distinguish between a conveyance to a third party required for [an appropriate public] purpose and a reservation unto the United States for the same purpose. Contrary to petitioner's position, were I to make a distinction, I would more readily find a reservation constitutionally permissible than a conveyance. In the case of a reservation, the submerged lands retain their sovereign status. . . . And if Congress later determines that the lands are no longer needed by the Federal Government for a public purpose, it can at that time transfer title to the State.

482 U.S. at 209-10. The United States has made a similar argument here: that given the courts' concern about the public interest in lands underlying navigable waters, there may be "far less reason to apply the *Montana* presumption against a federal claim of withholding, as opposed to alienation." USSRB 4 (emphasis in original). Alaska replies that the continued sovereign status of the lands is only part of the point:

The point of the Equal Footing Doctrine is to assure that newly admitted states have equal sovereignty to the original 13. The result is that the lands do remain in public ownership. But it is State public ownership and not Federal public ownership.

Tr. 2471.

In considering the weight to be given to Alaska's assertion, I turn to the precedents cited by the United States. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), strongly suggests that a prestatehood reservation of submerged lands may be effective as against the future state. That case concerned an act of Congress stating:

That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians

Act of Mar. 3, 1891, ch. 561, § 15, 26 Stat. 1095, 1101 (codified at 25 U.S.C. § 495 (1988)). The Court concluded that a fish trap, in deep water six hundred feet offshore, was within the reservation. Although the case was decided while Alaska was a territory, the defendant corporation made arguments based on both its fishing rights under the public trust doctrine and on the future state's rights under the equal footing doctrine. 248 U.S. at 79, 82. The Court said simply: "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement." *Id.* at 87.

The Court reached this result even though there was no conveyance to the Indians and even though, apparently, the waters were inland. Of the nature of the reservation, it said:

The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by

law," of designated public property for a recognized public purpose—that of safe-guarding and advancing a dependent Indian people dwelling within the United States.

Id. at 88. Although the Court did not discuss the distinction between inland and territorial waters, the inland status of the waters at issue would have followed from the United States' position in the Alaskan boundary arbitration of 1903. See *supra* section III, pages 64–65 & note 24. A later decision of the Court has also described *Alaska Pacific Fisheries* as involving inland waters. *United States v. Louisiana*, 363 U.S. 1, 69 (1960).⁴¹

The courts of appeals have also concluded that the Federal Government may retain land beneath inland navigable

⁴¹ Alaska, pointing out that *Alaska Pacific Fisheries* was decided long before it became a state, suggests that at statehood it may actually have received title to the submerged lands in the Metlakatla reservation, subject to the Indians' continued right of occupancy. That theory appears to be inconsistent with *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), which was a poststatehood case on whether Alaska could prohibit the Metlakatla Indians from using fish traps. The Court remarked there, "The Metlakatla Reservation was Indian property within § 4" of the Alaska Statehood Act. 369 U.S. at 58. Section 4 of the Statehood Act provides:

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives

Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958), reprinted as amended in 48 U.S.C. note preceding § 21 (1988). The Alaska Constitution contains a comparable disclaimer. Alaska Const. art. XII, § 12. Whatever the extent of the Indians' rights to the lands in the Metlakatla reservation, Alaska appears to have disclaimed "all right and title" to those lands.

waters by reserving them before creation of a state. *Utah v. United States*, 780 F.2d 1515, 1518 (10th Cir. 1985), *rev'd on other grounds sub nom. Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987); *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971) (Alaska Railroad case, finding reservation of tidelands and submerged lands for docks, wharves, and other facilities of federal railway terminal); *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970) (Kenai Moose Range case, finding reservation of bed of a navigable lake).

Finally, the Submerged Lands Act of 1953 assumes that the United States may retain lands beneath inland navigable waters. As noted in section E(1), the Act covers lands under inland waters as well as territorial waters. The rights granted or confirmed by the Act are subject to certain exceptions, including an exception for "all lands expressly retained by . . . the United States when the State entered the Union." § 5(a), 43 U.S.C. § 1313(a). By Alaska's theory, an express retention of lands under navigable inland waters would violate equal footing, and the exception for lands expressly retained would have to be restricted to submerged lands other than those under navigable inland waters.

Alaska refers to *United States v. California*, 436 U.S. 32 (1978) (Channel Islands National Monument), as holding that "a pre-Submerged Lands Act withdrawal of submerged lands . . . did not defeat California's title" ASB 15. That case, however, did not involve the equal footing doctrine. It concerned lands off Anacapa and Santa Barbara Islands, where the waters were territorial, not inland. California's rights were therefore based only on the Submerged Lands Act, and the result was purely a matter of statutory interpretation.⁴²

⁴² Even as a matter of statutory interpretation, the case did not speak to the effect of reservations in general. See *supra* note 39 and accompa-

The result suggested by *Alaska Pacific Fisheries*, the lower court cases, and section 5(a) of the Submerged Lands Act appears to be compatible with the policy considerations underlying *Montana* and *Utah*. One part of the policy stems from the public trust doctrine, which says that lands under navigable waters are to be held for the public benefit. Traditionally this benefit has been located mainly in fishing and navigation. *E.g., Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 413 (1842) (navigation and fishery) (quoted *supra* page 382); *Shively v. Bowlby*, 152 U.S. 1, 49 (1894) (commerce, navigation, and fishery) (quoted *supra* page 385). The Federal Government is no less able than the states to protect such public interests.

The second part of the policy stems from the equal footing doctrine. As a matter of history, the original states acquired lands under their navigable inland waters before the Federal Government was formed. *Martin v. Waddell*, 41 U.S. at 410. Equal footing then says that later-admitted states acquire similar rights. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845). And they can exercise these rights according to their own views of the public good. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475-76, 483-84 (1988); *Shively v. Bowlby*, 152 U.S. at 26, 57-58.

The states' equal-footing rights, however, are not absolute. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78

nying text. As mentioned there, the United States argued that its post-statehood reservation survived the Submerged Lands Act under the "claim of right" exception. The Court found, based on the legislative history, that the United States' paramount rights in the marginal sea provided an insufficient claim of right. It implied that the reservation might have been upheld had some further claim of right existed: "The United States has pointed to no other basis for believing that the submerged lands and waters in question were owned or controlled by the United States in 1949." 436 U.S. at 39 (emphasis added).

(1918); *Shively v. Bowlby*, 152 U.S. 1, 58 (1894). During the territorial period, the Federal Government is not required to hold submerged lands strictly in trust for a future state if important considerations of "international duty or public exigency" intervene. *Shively*, 152 U.S. at 50, 58. Thus, when a prestatehood conveyance to a third party is sustained, the United States' view of the exigencies takes precedence over the future state's interest in administering its public trust. In this aspect of the policy, there is no apparent reason why a prestatehood federal reservation or withdrawal of lands because of "international duty or public exigency" should not equally take precedence.

Alaska argues for a further aspect of the policy, based on "the close identification between dominion—i.e., ownership—over [submerged] lands and the exercise of local sovereignty." ASB 16 (quoted more fully *supra* page 396). The Court in *Montana* did say that "control over the property underlying navigable waters is . . . strongly identified with the sovereign power of government," 450 U.S. at 552, and it cited *United States v. Oregon*, 295 U.S. 1, 14 (1935). The *Oregon* case said:

Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of the sovereignty itself.

Alaska says that, in the case of a prestatehood conveyance, ownership has already been separated from sovereignty but that, in the case of a prestatehood withdrawal and reservation, no such severance has taken place. Alaska concludes that state sovereignty is diminished by continued federal ownership in a way that it would not be if the lands were privately held. I do not find this conclusion to be self-evident,

and its particulars have not been argued.⁴³ Nor is the conclusion supported by the Court's language in *Montana* or *Oregon*.⁴⁴

I conclude that a federal reservation or withdrawal of lands beneath inland waters is constitutionally permissible under the equal footing doctrine to the same extent as is a federal conveyance. Such a reservation may therefore be sustained if it meets the tests set out in *Utah*.

3. Authority for the reservation

I concluded above that a prestatehood reservation of submerged lands, like a conveyance, can under appropriate circumstances prevent title from passing to the state on admission to the Union. I now turn to whether such a reservation was accomplished in this case.

The Court in *Utah* stated two requirements for a reservation of submerged lands to remain effective through statehood: (1) that "Congress clearly intended to include land under navigable waters within the federal reservation" and

⁴³ For the National Petroleum Reserve-Alaska, any diminution of state sovereignty over the beds of navigable waters would be attributable to more than continued federal ownership. The Alaska Statehood Act specifically authorized Congress to exercise exclusive legislative jurisdiction over the Reserve. Pub. L. No. 85-508, § 11(b), 72 Stat. 339, 347 (1958), reprinted as amended in 48 U.S.C. note preceding § 21 (1988). Alaska has not contended that this statutory retention of federal sovereignty, if applied to submerged lands, would violate equal footing.

⁴⁴ In contrast to the situation here, *Montana* involved a potential alienation of public sovereignty as well as of public ownership. The underlying dispute concerned tribal authority to regulate "non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." 450 U.S. at 544. As the Seventh Circuit Court of Appeals stated in explicating the basis of *Montana*, "[T]he people . . . have a compelling interest in seeing that powers reposed in their government are not surrendered to private, non-representative groups." *Wisconsin v. Baker*, 698 F.2d 1323, 1334 (7th Cir.), cert. denied, 463 U.S. 1207 (1983).

(2) that "Congress affirmatively intended to defeat the future State's title to such land." 482 U.S. at 202. Alaska would infer a third requirement from *Utah*, namely that "Congress (and not the federal executive, acting alone) . . . took the actions that allegedly defeat a new state's title." A 2d SB 12. The United States replies that *Utah* introduced no such third requirement and that, in any case, the federal executive was not acting alone because the withdrawal and reservation were authorized by act of Congress.

In this section I consider the asserted third requirement as it applies to the Executive Order issued in 1923. The two following sections will deal with requirements 1 and 2.

Alaska's argument for a third requirement relies on *Utah*'s repeated use of language going to Congressional intent. The *Utah* decision does emphasize the Congressional role, as the tests quoted above illustrate. However, the documents requiring interpretation in *Utah* were mainly acts of Congress, and many of the Court's references to Congressional intent arose simply for that reason. Where relevant documents came from the executive branch, the Court reviewed those materials with equal care.

In *Utah*, a broad 1888 statute had reserved from sale "all the lands which may hereafter be designated or selected . . . for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals." Sundry Appropriations Act of 1888, ch. 1069, 25 Stat. 505, 527. In 1889, the Director of the United States Geological Survey had selected "the site of Utah Lake" as a reservoir site. In 1890, Congress repealed the 1888 Act with a savings clause for reservoir sites already selected. Sundry Appropriations Act of 1890, ch. 837, 26 Stat. 371, 391.

The Court first found that the 1888 Act did not refer to lands under navigable waters. 482 U.S. at 204. It found next that the Geological Survey, in selecting "the site of

Utah Lake," had not intended to select the lake bed. *Id.* at 204-07. It then concluded that the 1890 Act did not ratify any reservation of the lake bed. *Id.* at 207.

I do not find in the case any basis for a requirement that the reservation of submerged lands be accomplished by Congress itself. If Congress could have ratified an unauthorized executive reservation of the lake bed, as the Court implied, surely Congress could have delegated authority to make the reservation in the first instance.

I turn, therefore, to the question whether Congress authorized the reservation of submerged lands in the National Petroleum Reserve-Alaska. President Harding's 1923 Executive Order did not specify a particular legal basis, stating only that it was issued "by virtue of the power in me vested by the laws of the United States." *See supra* note 1.

The United States points to the Pickett Act as authority for the Order. Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847.⁴⁵ The Pickett Act stated in section 1:

⁴⁵ The United States has also suggested that the President had implied authority to withdraw submerged lands and that statutory authorization was therefore unnecessary. It cites *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), in which the Court sustained a 1909 presidential withdrawal on the theory that Congress had acquiesced in a long-standing practice of executive withdrawals, and *Withdrawal of Public Lands*, 40 Op. Att'y Gen. 73 (1941), in which Attorney General Robert H. Jackson concluded that this independent authority continued to exist even after the Pickett Act.

Alaska replies that independent executive authority to withdraw lands exists only to the extent that Congress has not provided otherwise. It notes that even in the *Midwest Oil* case the United States took the position that the President may reserve public land for public purposes "in the absence of any congressional inhibition." ARB 8-9, citing the United States' brief in *Midwest Oil*, 59 L.Ed. 673, 675. Alaska finds a congressional limitation on executive power in an earlier statute, the Alaska Right of Way Act, to be discussed below. Since the Property Clause gives Congress plenary power over the public lands, Alaska's point appears to be a strong one.

That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.⁴⁶

The issue is whether this section authorized withdrawal and reservation of submerged lands as well as uplands. Arguments have been made from the text of the Pickett Act itself and from its construction together with an earlier statute.

As to the text of the Pickett Act, Alaska notes that the Act applies to "public lands," and it has argued that public lands do not include tidelands or submerged lands.⁴⁷ Alaska may also wish to argue that the Pickett Act, in authorizing withdrawal from "settlement, location, sale, or entry," did not authorize withdrawal of submerged lands because submerged lands were already exempt from such forms of disposal.⁴⁸

⁴⁶ This section was repealed by the Federal Land Policy and Management Act of 1976, § 704(a), Pub. L. No. 94-579, 90 Stat. 2743, 2792. The implied authority of the President, *supra* note 45, was also "repealed" by the same section. The 1976 Act, a comprehensive reorganization of federal land law, covers authority for withdrawals in section 204, 43 U.S.C. § 1714 (1988).

⁴⁷ This argument, made originally with respect to the Arctic National Wildlife Range, applies equally to the National Petroleum Reserve-Alaska.

⁴⁸ Alaska has made parallel arguments concerning the Arctic National Wildlife Range, although it directs them to the interpretation of documents other than the Pickett Act.

Alaska has also argued that because the Pickett Act authorizes withdrawals only from "settlement, location, sale, or entry," the Act does not authorize withdrawal as against automatic transfer at statehood. This argument was raised before the decision in *Utah*, which distinguished between the questions (1) whether submerged lands were included in the

These arguments parallel the Court's reasoning in *Utah*, where the 1888 Act reserved lands from "sale, entry, settlement or occupation," and the Court found that the Act did not reserve submerged lands because they "were *already* exempt from sale, entry, settlement, or occupation under the general land laws." 482 U.S. at 203 (emphasis in original). The Court also quoted a definition of "public lands" as "those lands subject to sale or other disposal under the general land laws." *Id.* at 206, quoting Ernest C. Baynard, *Public Land Law and Procedure* § 1.1 (1986).

For two reasons, the Court's analysis in *Utah* is not immediately applicable to the meaning of "public lands" in the Pickett Act. First, lands beneath navigable waters in Alaska were not wholly immune from the general land laws. When Congress extended the mining laws to Alaska, it provided specifically that certain tidelands and submerged lands were to be open to mining for gold and other precious metals. Act of June 6, 1900, ch. 786, § 26, 31 Stat. 321, 329-30 (current version at 30 U.S.C. § 49a (1988)).⁴⁹

withdrawal and (2) whether a withdrawal that did include submerged lands was intended to defeat the passage of title at statehood. In this section, I am considering only a preliminary to question 1, that is, whether the Pickett Act authorized even a temporary withdrawal of submerged lands. The continuation of such a withdrawal through statehood is considered in a later section.

⁴⁹ The 1900 Act stated:

Provided, That . . . all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals . . . : *Provided further*, . . . citizens . . . shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide

Later amendments extended these provisions beyond the Bering Sea to "the shores, bays, and inlets of Alaska," Act of May 31, 1938, ch. 297, 52 Stat. 588, and to land beneath nontidal navigable waters, Act of Aug. 8, 1947, ch. 514, 61 Stat. 916.

Second, in another case decided the same Term as *Utah*, the Court made clear that the meaning of the term "public lands" depends on the context:

We . . . reject the assertion that the phrase "public lands," in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute. See *Hynes v. Grimes Packing Co.*, 337 U.S., at 114-116.

Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 549 n.15 (1987) (opinion of the Court by White, J.).⁵⁰ In *Hynes v. Grimes Packing Co.*, the Court had said:

When one deals with a statute . . . large in purpose . . . one may not fully comprehend the statute's scope by extracting from it a single phrase, such as "public lands," and getting the phrase's meaning from the dictionary or even from dissimilar statutes.

337 U.S. 86, 115-16 (1949).⁵¹

⁵⁰ In *Amoco*, the Court held that the outer continental shelf was not "public lands" within the meaning of section 810(a) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120(a) (1988). In reaching this result, the Court applied the definition of "public lands" given in section 102 of the Act, 16 U.S.C. § 3102:

- (1) The term "land" means lands, waters, and interests therein.
- (2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.
- (3) The term "public lands" means lands situated in Alaska which, after December 2, 1980, are Federal lands, except

The issue was whether the outer continental shelf was "in Alaska," not whether the definition covered submerged lands. 480 U.S. at 546-555.

⁵¹ In *Hynes*, a statute authorized the Secretary of the Interior to designate as an Indian reservation any "public lands which are actually occupied by Indians or Eskimos." Act of May 1, 1936, ch. 254, § 2, 49 Stat. 1250 (amending the Wheeler-Howard Act, ch. 576, 48 Stat. 984 (1934)) (repealed 1976). The Secretary designated an area defined in part as "[t]he area described above and the waters adjacent thereto extending 3,000 feet from the shore line at mean low tide." Public Land Order 128,

In *Utah*, the Court described the context as involving Congressional concern in 1888 with monopolization and speculation, which had nothing to do with the beds of navigable waters. 482 U.S. at 203. The Court also mentioned the Geological Survey's concern in 1889 that speedy action was needed to prevent settlement on lands adjacent to Utah Lake, which would interfere with its use as a reservoir. *Id.* at 206-07. Finally, the Court explained Congress's concern in 1890: The 1888 Act had caused "a perfect storm of indignation from the people of the West" because, in reserving all the land that might be designated for reservoir sites, it in effect reserved all public lands. Congress was responding to this reaction when it repealed the 1888 Act, continuing the reservation only for reservoir sites already selected. *Id.* at 199.

The background of the 1910 Pickett Act is different from the background of the *Utah* statutes. Before turning to its immediate motivation, I mention an element of the broader context that affects Alaska. This was the Alaska Right of Way Act, enacted in 1898, which said that submerged lands in Alaska were to be held in trust for the future state. Act of May 14, 1898, ch. 299, 30 Stat. 409 (current version primarily at 43 U.S.C. §§ 942-1 to 942-9 (1988)). This statute extended the homestead laws to Alaska and granted right of way through federal lands for railroads in Alaska. When a railway connected with "any navigable stream or tide water," the railroad company was empowered "to construct and

8 Fed. Reg. 8557 (1943). The Court found that the Secretary acted within his authority, "[t]aking into consideration the importance of the fisheries to the Alaska natives, the temporary character of the reservation, the Annette Islands case, the administrative determination, the purpose of Congress to assist the natives by the Alaska amendment to the Wheeler-Howard Act." 337 U.S. at 116. The Annette Islands case is *Alaska Pacific Fisheries v. United States*, discussed *supra* pages 399-400.

maintain necessary piers and wharves for connection with water transportation," provided:

That nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, *it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District.* The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark.

Id., § 2, 43 U.S.C. § 942-1 (emphasis added).⁵² The language quoted appears to be a codification for Alaska of the equal footing doctrine.

Alaska has suggested in passing that the Right of Way Act operates to limit the powers later granted by the Pickett Act. I do not understand this argument to address the power of Congress to enact the Pickett Act, since an earlier Congress cannot bind a later one. The argument must therefore address the intent of Congress in enacting the Pickett Act.

A central purpose of the Pickett Act was to authorize the withdrawal of lands valuable for oil.⁵³ In the period just

⁵² The Federal Land Policy and Management Act of 1976, *supra* note 46, § 706(a), also modified this act, repealing it "insofar as applicable to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System."

⁵³ For the history reviewed below, see *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915); Robert W. Swensen, *Legal Aspects of Mineral Resources Exploitation*, in Paul W. Gates, *History of Public Land Law*

before its enactment in 1910, lands known to be valuable for minerals were covered by the placer mining laws, originally passed in 1870 and 1872 and extended to oil lands in 1897. Rev. Stat. §§ 2329-2333 (1878) (current version at 30 U.S.C. §§ 35-38 (1988)); Act of Feb. 11, 1897, ch. 216, 29 Stat. 526. Under these laws, a locator on mineral lands could obtain title, at \$2.50 an acre, once minerals were discovered. During this same period, the Navy was converting its ships from using coal to using oil. The Director of the Geological Survey wrote in 1908 that, if nothing were done, the United States would soon be forced to buy back the very fuel resources it was now practically giving away. In September 1909, President Taft responded by withdrawing large tracts of land in California and Wyoming as a "temporary petroleum withdrawal."

This early oil-land withdrawal was made without statutory authority, and the President's power to suspend the public land laws was in considerable doubt.⁵⁴ He requested withdrawal authority in a message to Congress in 1910, 45 Cong. Rec. 621, 622, and the Pickett Act was the form in which this authority was given. Eventually the Congress adopted a new policy for public lands valuable for minerals, permitting them to be leased rather than patented. Mineral

Development 699, 721-23, 731-45 (1968); Navy Department, *History of Naval Petroleum Reserves*, S. Doc. No. 187, 78th Cong., 2d Sess. (1944); Reginald W. Ragland, *A History of the Naval Petroleum Reserves and of the Development of the Present National Policy Respecting Them* (1944). Many of the documents are collected in Max W. Ball, *Petroleum Withdrawals and Restorations Affecting the Public Domain* (U.S. Geological Survey Bull. 623, 1916). Hearings on the Pickett Act are reported in *Oil-land Withdrawals and the Protection of Locators of Oil Lands: Hearings on H.R. 24070 Before the House Comm. on the Public Lands*, 61st Cong., 2d Sess. (1910).

⁵⁴ The 1909 withdrawal was eventually sustained in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). See *supra* note 45.

Leasing Act of 1920, ch. 85, 41 Stat. 437 (current version at 30 U.S.C. §§ 181-287 (1988 & Supp. V 1993)).

In the history of the Pickett Act I have found no direct evidence that thought was given to withdrawal of tidelands and submerged lands. I believe, however, that the Act should be construed to permit such withdrawals.

First, the Act authorized withdrawals or reservations for a wide range of purposes: "water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals." The statute is thus broader than the 1888 Act considered in *Utah*, which was concerned only with reservoir sites and irrigation. See *supra* page 405. An indication of the range of "other public purposes" likely to have been contemplated at the time, in addition to the protection of oil lands, may be obtained from the *Midwest Oil* case, 236 U.S. 459 (1915), in which the Court reviewed many other purposes for which lands had been withdrawn in the past. See 236 U.S. at 470; *id.* at 489 n.2 (Day, J., dissenting). Those that may have involved water-covered areas included lighthouses, water supplies for military reservations, bird refuges, Indian reservations, and reservoir sites. Although *Utah* found that a reservoir site did not require reservation of submerged lands, some of the purposes may have been thought at the time to require them. Cf. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949) (both upholding inclusion of water-covered areas within Indian reservations created under other statutes). As for oil lands themselves, the possibility of creating naval petroleum reserves was discussed at hearings on the Pickett Act, along with the possibility of drainage by drilling on adjacent land.⁵⁵ It is noteworthy that oil drilling on submerged lands

⁵⁵ *Oil-land Withdrawals and the Protection of Locators of Oil Lands: Hearings on H.R. 24070 Before the House Comm. on the Public Lands*,

had taken place well before the Pickett Act was passed.⁵⁶ The purposes of the Act thus suggest that withdrawal of submerged lands as well as upland was authorized.

Second, the Pickett Act does not itself reserve any lands but only provides authority for their withdrawal or reservation. In this respect also it is unlike the 1888 Act considered in *Utah*, which produced a wholesale closing of the public lands. Whether there is need in any particular case to include lands under navigable waters in a reservation remains open for examination in construing each separate exercise of Pickett Act authority. Similarly, the Pickett Act situation differs from that which prompted the Court to say that "Congress has never undertaken by general laws to dispose of" land under navigable waters. *Shively v. Bowlby*, 152 U.S. at 48, *quoted in Utah*, 482 U.S. at 203. Although the Pickett Act is indeed a general law, it does not provide for a general disposition of lands under navigable waters but rather for withdrawals or reservations in particular cases.

The question remains whether this reading of the Pickett Act is refuted by the existence of the Alaska Right of Way Act. I believe it is not. The Pickett Act was national in scope, whereas the Right of Way Act dealt only with Alaska. Thus, if the Pickett Act made a silent exception for Alaskan submerged lands, it should be read to except submerged lands everywhere.⁵⁷ On such a reading, the Act would not

61st Cong., 2d Sess. 111-14, 116-17, 145 (1910) (testimony of Dr. George Otis Smith, Director of the Geological Survey).

⁵⁶ See 2 Aaron L. Shalowitz, *Shore and Sea Boundaries* 268 (U.S. Dep't of Commerce Pub. 10-1, 1964) (mentioning an 1876 hydrographic survey that showed an oil well about a mile offshore in Santa Monica Bay, California); Solicitor's Opinion, 86 Interior Dec. 151, 167 (1978) (mentioning oil drilling off the California coast as early as 1896).

⁵⁷ Since lands under navigable inland waters generally pass to the states upon their admission to the Union, such an exception would have been significant primarily to areas that were not yet states when the Pick-

authorize the President to respond even to an "international duty or public exigency" of the sort referred to in *Shively v. Bowlby*, 152 U.S. at 50; *Montana*, 450 U.S. at 552; and *Utah*, 482 U.S. at 197. Such a narrow reading seems inconsistent with the authorization to act for "other public purposes to be specified in the orders of withdrawals."

Furthermore, the Court considered both the Pickett Act and the Alaska Right of Way Act in *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). *Hynes* was a prestatehood case in which the Secretary of the Interior had designated certain fisheries as part of an Indian reservation in Alaska. See *supra* note 51. The Secretary's order rested in part, although not principally, on a delegation to him of the President's authority under the Pickett Act. 337 U.S. at 89-90. Of the delegation the Court said:

This chain of delegated authority for the allocation of public lands in Alaska retains for future congressional action the power for the ultimate disposition of the property, land and water, within the boundaries of the reservation. Withdrawals under the Act of June 25, 1910 [the Pickett Act], are "temporary" and "until revoked by him or by an Act of Congress."

Id. at 101. The Court then quoted the Alaska Right of Way Act, *id.* at 102-03, and it reconciled the reservation of fisheries with that statute on the ground that the reservation was not a permanent disposition but remained "subject to the unfettered will of Congress." *Id.* at 106. Although in *Hynes* the authorization to reserve fisheries rested on a statute other than the Pickett Act, the same reasoning would apply to a Pickett Act reservation.

ett Act was passed in 1910. The territories at that time were Arizona, New Mexico, and Hawaii. Alaska itself was technically a district rather than a territory until 1912. See Act of Aug. 24, 1912, ch. 387, 37 Stat. 512.

I conclude that Congress authorized the reservation of submerged lands through the Pickett Act. The Alaska Right of Way Act may still be given effect, like the equal footing doctrine generally, in interpreting the intent of the executive and of later Congresses with respect to particular withdrawals or reservations in Alaska.

4. *Intention to reserve submerged lands*

Having found that the Pickett Act authorized withdrawal of submerged lands as well as uplands, I now turn to the question whether the 1923 Executive Order creating the Petroleum Reserve did reserve submerged lands. At issue are all lands under tidally influenced waters inside the Reserve boundary.⁵⁸ According to the boundary description, *supra* pages 345–46, these waters include (1) small lagoons with near-shore barrier reefs and (2) the waters landward of the Plover Islands, from Point Tangent to Point Barrow (namely Elson Lagoon, Dease Inlet, and Admiralty Bay). As I have interpreted the boundary description in question 11, tidally influenced parts of rivers are also in dispute.

a. *The precedents*

In *Montana* and *Utah* the Court announced the principles that govern interpretation of the 1923 Executive Order. In *Montana* the Court stated:

[I]t will not be held that the United States has conveyed . . . land [underlying navigable waters] except because of “some international duty or public exigency.” A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such

⁵⁸ As to lands under nontidal navigable waters, see *supra* note 4 and accompanying text.

a conveyance “unless the intention was definitely declared or otherwise made plain,” or was rendered “in clear and especial words,” or “unless the claim confirmed in terms embraces the land under the waters of the stream.”

450 U.S. at 552 (citations omitted; see *supra* section D(2)). The same points were made, in much the same language, in *Utah*. 482 U.S. at 197–98.

This language sets out two requirements with respect to a prestatehood conveyance of submerged lands. The same requirements are necessary (though not sufficient) for withholding submerged lands from the state by means of a prestatehood federal reservation. See *supra* section E(2). There must be an important purpose justifying the conveyance or reservation (e.g., a “public exigency”), and there must be strong evidence of intent to convey or reserve the lands (e.g., “clear and especial words”).

The facts of *Montana* and *Utah* provide a gloss on the nature of these requirements. In *Montana*, the Court held that a treaty creating an Indian reservation did not convey title to the bed of a navigable river inside the reservation boundary. As to evidence of intent to convey the riverbed, the Court said:

Whatever property rights the language of the 1868 treaty created . . . its language was not strong enough to overcome the presumption against the sovereign’s conveyance of the riverbed. The treaty in no way expressly referred to the riverbed, nor was an intention to convey the riverbed expressed in “clear and especial words,” or “definitely declared or otherwise made very plain.” . . .

. . . The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance.

450 U.S. at 554 (citations omitted). As I read this passage, the Court treated the lack of reference to the riverbed as evidentiary, not as decisive. An express reference was one way, but not necessarily the only way, that intent to convey the riverbed might be "made very plain." The Court in *Montana* also went on to confirm its interpretation by finding that no "public exigency" existed: "[A]t the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." 450 U.S. at 556. Had express reference to the riverbed been a sine qua non for its conveyance, this step would have been unnecessary.

In *Utah*, the United States was held not to have reserved the bed of Utah Lake even though certain references to the lake bed had been made. As described *supra* pages 405, 410, Congress had authorized the United States Geological Survey to select sites for reservoirs and had reserved "all the lands which may hereafter be designated or selected" for that purpose, together with "all the lands made susceptible of irrigation" by such reservoirs. The Court found that the reservation did not of itself include submerged lands, 482 U.S. at 203-04, and it then considered whether the Geological Survey, acting beyond its authority, had nonetheless selected the bed of Utah Lake. The Survey defined its selection as the "site of Utah Lake . . . together with all lands situate within two miles of the border of said lake at high water." 482 U.S. at 199. The lake bed itself was mentioned only in later annual reports to Congress. The Court, in giving a narrow construction to the Survey's language, found that the Survey's concern was not with the lake bed but with the adjacent land, whose availability to public sale and settlement might obstruct the use of the lake as a reservoir. *Id.* at 206-07.⁵⁹

⁵⁹ In one report, the Geological Survey referred to the withdrawal of Utah Lake "so far as the lands covered or overflowed by it or the lands

Having concluded that the Survey's language did not establish an intent to select the lake bed, the Court also found it did not show that Congress, in a later statute that continued previous selections, understood the lake bed to have been selected. Finally, the Court found that federal retention of the lake bed might not be required in any case: "The transfer of title of the bed of Utah Lake to Utah . . . would not necessarily prevent the Federal Government from subsequently developing a reservoir or water reclamation project at the lake in any event." 482 U.S. at 208.

Given the Court's consideration of all the circumstances in *Montana* and *Utah*, I do not find that these cases require a specific form of language in order to include submerged lands within a federal reservation or conveyance. Indeed, neither party contends that they do. At oral argument, Alaska suggested that the greater the exigency calling for the inclusion of submerged lands, the less the need for "clear and especial words." Tr. 2468-69. Alaska then emphasized its position that, if the exigency is not clear, the language must be wholly express. Tr. 2469, 2470, 2478. The United States generally agreed with Alaska on the relation between language and exigency:

[T]he true test of the *Montana* case is that there be a clear indication of intent to withhold from the future state the water body in question and that that can be sufficiently shown by clear language or by circumstances, including exigency, and that either way of showing the clear intent to withhold from the future state is sufficient.

bordering upon it were still public lands." 482 U.S. at 204. In another, the Survey reported that "the segregation" of the lake "was made to include not only the bed but the lowlands up to mean high water." *Id.* at 204-05. The Court found that the lake bed had been segregated years earlier from public sale and that the phrase "still public lands" meant lands still subject to public settlement. *Id.* at 205-06.

Tr. 2428-29. The United States noted also that, in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), the Court found a reservation of submerged lands on the basis of exigency alone. Tr. 2429, 2430. There, an Indian reservation was defined simply as "the body of lands known as Annette Islands." See *supra* page 399. The Court concluded that the reservation included submerged lands because "[t]he Indians could not sustain themselves from the use of the upland alone." 248 U.S. at 89.⁶⁰

⁶⁰ The Court in *Alaska Pacific Fisheries* said that, to determine what Congress intended in defining the reservation, one must look to "the circumstances in which the reservation was created—the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained." 248 U.S. at 87. The case was cited with apparent approval in *Montana*, 450 U.S. at 556. See also *United States v. Aranson*, 696 F.2d 654, 665-66 (9th Cir.) *cert. denied*, 464 U.S. 982 (1983), in which the court of appeals stated:

Significantly, the Court in *Montana* did not overrule its earlier decision in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78

Thus, we conclude that the Supreme Court's decision in *Montana* permits a court to infer congressional intent to convey the bed beneath navigable waters if the Indians can prove they depended heavily on the particular body of water.

Similarly, the Seventh Circuit Court of Appeals has said: "[W]e must . . . presume—absent evidence of a contrary intention 'definitely declared or otherwise made plain,' or of a 'public exigency' sufficient to warrant an inference of such an intention" that there was no conveyance of land underlying navigable waters. *Wisconsin v. Baker*, 698 F.2d 1323, 1335 (7th Cir.), *cert. denied*, 463 U.S. 1207 (1983) (rejecting an Indian claim to submerged lands).

The parties have cited several other lower court cases. Reservations or conveyances of submerged lands were sustained in *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1981), *cert. denied*, 459 U.S. 977 (1982) (conveyance of lake bed at boundary of Indian reservation); *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971) (reservation for docks, wharves, and other facilities for Alaska Railroad); and *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert.*

b. *The language and purpose of the Executive Order*

With this background, I consider whether Executive Order 3797-A shows a clear intent to reserve submerged lands. In the description of the lands reserved there are several potentially relevant provisions. First is the operative paragraph of the Order (quoted in full, *supra* note 1):

NOW, THEREFORE, I, WARREN G. HARDING, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby set apart as a Naval Petroleum Reserve all of the public lands within the following described area not now covered by valid entry, lease or application:

Second is the boundary description. Where there are near-shore barrier reefs, the boundary is defined as "the ocean side of the sandspits and islands forming the barrier reefs and extending across small lagoons from point to point." At the Plover Islands, the boundary is defined as following the outer shore of the islands and "extending between the most adjacent points of these islands and the sandspits at either end." Finally, the Order refers to "lands or waters":

The reservation hereby established shall be for oil and gas only and shall not interfere with the use of the lands or waters within the area indicated for any legal purpose not inconsistent therewith.

Alaska notes that the Order reserves only "public lands . . . not now covered by valid entry, lease or application." It says that public lands do not, or at least may not, include

denied, 400 U.S. 967 (1970) (reservation of "land and water" for Kenai Moose Range). As Alaska notes, however, the latter two cases were decided before *Montana*. In *Confederated Salish Tribes*, Justices Rehnquist and White dissented to the denial of certiorari, expressing doubt that the court had correctly applied the presumption of *Montana*. 459 U.S. at 978-79. For two later cases, see *infra* note 62.

submerged lands. Further, it infers that the reservation was intended to reach only lands subject to entry, lease or application, which it says do not include submerged lands.

I do not find these points dispositive. I have already concluded that the meaning of "public lands" is context dependent. See *supra* pages 407-09. As to the exclusion of lands already "covered by valid entry, lease or application," the United States responds that the exclusion of these lands "sheds no light on the scope of the reservation as regards other lands." US 2d SRB 16 n.4. This response appears correct. To provide for existing claims is not to say anything about whether claims could be made on all the lands reserved.

More centrally, Alaska emphasizes that the Executive Order nowhere mentions submerged lands as such. The United States replies that it does mention small lagoons and the area behind the Plover Islands, drawing the boundary outside these bodies. It contrasts the situation in *Montana*, where neither the riverbed nor the river itself was mentioned. See Second Treaty of Fort Laramie, 15 Stat. 649 (1868) (quoted in relevant part, 450 U.S. at 553 n.4).⁶¹

The intention behind the boundary language is illuminated by the Order's statement of the purpose of the reservation. The reservation was for oil and gas, which might lie in submerged lands as well as the upland. If the drafters had not intended to reserve the resources in submerged lands, there would have been no point in their drawing the boundary to include them.⁶²

⁶¹ The treaty in *Montana* did mention the Yellowstone River on the boundary of the Reservation, but the dispute before the Court concerned the Big Horn River. See 450 U.S. at 577 (Blackmun, J., dissenting in part); Tr. 2430.

⁶² Alaska has drawn the Master's attention to two cases that were decided after the completion of all briefings on the Petroleum Reserve. *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), cert. denied, 495

Furthermore, a purpose to reserve submerged lands was supported by exigent circumstances. The Executive Order contained several clauses bearing on the need for the Reserve:

U.S. 919 (1990); *State of Alaska*, 102 IBLA 357 (Interior Bd. of Land Appeals 85-768, June 10, 1988). Each held, citing *Utah*, that submerged lands were not reserved by the United States but passed to Alaska at statehood. Neither, however, is comparable to the present case.

In *Alaska v. Ahtna, Inc.*, the question concerned lands underlying thirty miles of the lower Gulkana River. If title had passed to Alaska at statehood, the lands were not available for conveyance to Ahtna by the Bureau of Land Management under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629e (1988 & Supp. V 1993) (enacted 1971). The lower Gulkana was found to be navigable and so would normally pass to Alaska. Ahtna argued on appeal, however, that Congress had reserved title to the riverbed as property that "may be held" by Alaskan natives. This reservation was said to have been made by section 4 of the Alaska Statehood Act, quoted *supra* note 41.

The court held that section 4 was too general a statement to show clear intent to reserve lands under navigable waters. This result seems correct. Under Ahtna's contention, section 4 would have withheld from Alaska not only submerged lands previously reserved for natives, as in the Metlakatla reservation, but the beds of *all* the State's navigable rivers. See 891 F.2d at 1406.

State of Alaska involved a similar dispute over the bed of the navigable Katalla River. The Bureau of Land Management had approved the riverbed for conveyance to a native corporation, reasoning that title had not passed to Alaska at statehood because the riverbed was part of a pre-statehood federal reservation for the Chugach National Forest. The Interior Board of Land Appeals reversed, reciting the tests of *Utah* and finding that "[n]one of the establishing documents refers even remotely to lands under navigable waters or manifests a congressional intent regarding disposition of riverbed lands." 102 IBLA at 361.

In contrast to the submerged lands of the Petroleum Reserve, there appears to have been nothing in the record of *State of Alaska* linking the bed of the Katalla River to the purposes of the reservation. The area including the Katalla River was added to the Chugach National Forest, "for Forest purposes," by presidential proclamation in 1909. 35 Stat. 2231, 2232. Another purpose mentioned in the proclamation, which

WHEREAS there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast and,

WHEREAS the present laws designed to promote development seem imperfectly applicable in the region because of its distance, difficulties, and large expense of development and,

WHEREAS the future supply of oil for the Navy is at all times a matter of national concern,

NOW, THEREFORE, I, WARREN G. HARDING . . . do hereby set apart as a Naval Petroleum Reserve [certain lands]

. . . .

Said lands to be so reserved for six years for classification, examination, and preparation of plans for development and until otherwise ordered by the Congress or the President.

The reservation hereby established shall be for oil and gas only and shall not interfere with the use of the lands or waters within the area indicated for any legal purpose not inconsistent therewith.

The parties have also introduced two letters written to the

might have had a stronger connection to submerged lands, was the establishment of fish culture stations. *Id.* It was not clear, however, that the fish culture purpose extended to the Katalla River. See Proclamation No. 39, 27 Stat. 1052 (1892) (creating the Afognak Forest and Fish Culture Reserve); Proclamation of July 23, 1907, 35 Stat. 2149 (creating the Chugach National Forest); Exec. Order No. 908 (July 2, 1908) (consolidating the two), *microformed on* Presidential Executive Orders, Nos. 1-7403, reel 2 (Library of Congress Photoduplication Serv.); Proclamation of Feb. 23, 1909, 35 Stat. 2231 (adding the Katalla River area to the Chugach National Forest). See also Act of Mar. 3, 1891, ch. 561, § 14, 26 Stat. 1095, 1100 (mentioning sites for fish-culture stations only "on the island of Kadiak and Afognak [sic]").

Secretary of the Interior just before creation of the Reserve, one by H. Foster Bain, Director of the Bureau of Mines (Ak. Ex. 82), and one by Theodore Roosevelt, Acting Secretary of the Navy (Ak. Ex. 83; U.S. Ex. 86 at 249).

As to the "future supply of oil for the Navy," mentioned in clause 3 of the Order, the background goes back at least to 1908, when Dr. George Otis Smith, Director of the Geological Survey, made recommendations that led to President Taft's oil-land withdrawals in 1909. See *supra* page 412. After statutory withdrawal authority was given by the Pickett Act, President Taft issued orders confirming the previous withdrawals and, in 1912, modifying them to create Naval Petroleum Reserves Nos. 1 and 2 in California. Naval Petroleum Reserve No. 3, at Teapot Dome, Wyoming, was created in 1915 by Executive Order of President Wilson.⁶³ Soon after President Harding created Reserve No. 4 in 1923, Congress passed a joint resolution referring to "the settled policy of the Government, adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy in any emergency threatening the national security." S.J. Res. 54, 68th Cong., 1st Sess., 43 Stat. 5, 6 (Feb. 8, 1924).⁶⁴

There can be no doubt that this purpose constitutes a public exigency sufficient to warrant a reservation including submerged lands. As the United States observes, the object of the Reserve was "to set aside potentially 'valuable petroleum fields,' which might lie beneath the shallow lagoon waters as well as the upland." USSB 7.

⁶³ For the orders creating Reserves Nos. 1 through 3, see Ball, *supra* note 53, at 283, 290, 332.

⁶⁴ The events provoking this resolution involved the earlier Naval Petroleum Reserves and were contemporaneous with the creation of Reserve No. 4. See *Mammoth Oil Co. v. United States*, 275 U.S. 13 (1927); *Pan American Petroleum & Transp. Co. v. United States*, 273 U.S. 456 (1927).

A secondary purpose of the Reserve, as stated in clause 2 of the Order, was to "promote development" in Alaska. The Navy's letter noted that development of the oil potential in northern Alaska would be "commercially practicable only if undertaken on a large scale," probably involving an extension of the Alaskan Railway and over a thousand miles of pipeline. Ak. Ex. 83; U.S. Ex. 86 at 249.⁶⁵ The Bureau of Mines' letter mentioned similar considerations, stating that "[i]n the judgment of experienced oil operators the existing law is not sufficiently elastic to permit economic development of the fields" Ak. Ex. 82. The existing law was the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437 (current version at 30 U.S.C. §§ 181-287 (1988 & Supp. V 1993)). The Bureau of Mines stated further:

Near the Arctic at several points there are large oil seepages and at two points locations have been made upon these under the leasing act of February 25, 1920. A number of permits have been granted but many of the locations are in conflict, as shown by the attached record and map of the Smith Bay district, and the process of adjudication of these claims is necessarily very slow.

. . . Under present conditions nothing other than waste of money and the acquirement by various individuals of

⁶⁵ Roosevelt's letter for the Navy added:

In view of these facts and having particularly in view the future needs of the American Navy for an adequate supply of fuel oil and other petroleum products, I would suggest that arrangements be made to set aside and designate as Naval Petroleum Reserve No. 4, the areas in Alaska hereafter specified. . . .

While this reservation will probably be of immense value to the Nation through its benefit to the American Navy, I would again invite attention to the possibilities in connection with the whole development of the Territory of Alaska and more particularly to the possibilities of obtaining a means of revenue to the Alaskan Railroad.

Ak. Ex. 83; U.S. Ex. 86 at 249

shadowy but troublesome claims on the public domain can result.

Ak. Ex. 82.

Alaska argues here that there was no need to include submerged lands in the Reserve because they were not subject to private claims. The United States replies that it was unclear in 1923 whether submerged lands were subject to the Mineral Leasing Act,⁶⁶ and it points to a statement by the Solicitor of the Interior that during the 1920s the Department issued some prospecting permits under that Act "which included submerged lands in the Arctic Ocean in the vicinity of Smith Bay." Solicitor's Opinion, 86 Interior Dec. 151, 167.⁶⁷

Be that as it may, these arguments do not reach the primary reason for creating a naval petroleum reserve. Even if the lands were immune from private claims, that would not have sufficed to make their resources available for the Navy. Furthermore, there is reason to think that the Reserve was intended to be a compact tract that would, so far as possible, be free of conflicting interests.⁶⁸ This is not to say that the

⁶⁶ The issue was first decided in 1947, when it was held that the Mineral Leasing Act does not authorize issuance of oil and gas leases offshore and outside the inland waters of the states. Solicitor's Opinion, 60 Interior Dec. 26 (1947) (Ak. Ex. 79), *upheld in Justheim v. McKay*, 123 F. Supp. 560 (D.D.C. 1954), *aff'd*, 229 F.2d 29 (D.C. Cir.), *cert. denied*, 356 U.S. 933 (1956). To the same effect is 40 Op. Att'y Gen. 540 (1947).

⁶⁷ Such permits are not in evidence, and Alaska does not concede their existence. See ASRB 16 n.9. The Solicitor's opinion states that the permits are on file in the BLM office in Anchorage. 86 Interior Dec. at 167 n.18.

⁶⁸ In the earlier naval petroleum reserves in California, the tracts withdrawn were studded with land already in other hands, much of it as a result of previous land grants to the Southern Pacific railroad. Other property within the reserves was subject to claims not yet patented. The result was considerable litigation and, where private claims were upheld, drainage of the Navy lands from private wells. See Navy Department,

executive, in 1923, had any formed intent as to the conflicting interests of a future state. The stated duration of the Reserve was indefinite: "for six years for classification, examination, and preparation of plans for development and until otherwise ordered by Congress or the President." As in *Hynes v. Grimes Packing Co.*, *supra* page 415, this left the ultimate disposition of the entire Reserve, including any submerged lands, an open question.

Finally, Alaska makes another argument based on the Bureau of Mines' letter proposing the Reserve, Ak. Ex. 82. Alaska reads the letter as making clear "that the focus of the executive order was the Arctic plain, that upland area between the crest of the mountains and the water." ASRB 16. The letter does mention the "Arctic plain" or the "Arctic slope" repeatedly. The Executive Order, however, speaks of observed seepages "along the Arctic Coast and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast."⁶⁹ Given the Executive Order's references

supra note 53; Ragland, *supra* note 53. When the site for Reserve No. 3 was being selected in 1915, Secretary of the Navy Daniels wrote to the Secretary of the Interior:

Although it is not absolutely certain that this area [Teapot Dome] will be productive, the Navy Department considers it advisable to select this area rather than one where the presence of oil has been determined by actual producing wells, as in the latter case there would be adverse claims with the consequent litigation, strong opposition to the creation of the Reserve, and the danger of wells remaining in private ownership so as to make it possible to drain a large part of the Reserve.

Ragland, *supra*, at 44; see also Navy Department, *supra*, at 3. In 1917 the Navy submitted draft legislation to Congress that would have eliminated all private interests in Reserves Nos. 1, 2, and 3 by condemnation. Ragland, *supra*, at 60-65.

⁶⁹ The main seepage that had been documented in the Reserve area was near the shore at Cape Simpson, on the west side of Smith Bay. George C. Martin, *Preliminary Report on Petroleum in Alaska* 68-70

to the Arctic Coast, the Bureau of Mines' references to the Arctic plain are not controlling.⁷⁰

c. Conclusion

I conclude that the drafters of Executive Order 3797-A had good reason to include in Naval Petroleum Reserve No. 4 all the lands within the exterior boundary. They expressly placed small lagoons and the water bodies behind the Plover Islands inside the boundary. Since the object was to conserve underground resources and since the submerged areas were relevant only for their beds, I find that the Order reserved these submerged lands.

Rivers within the Reserve boundary, whose tidally influenced portions are also at issue, are more closely associated with the upland than are the water bodies expressly included. I therefore believe that the inclusion of the beds of tidally influenced parts of rivers follows a fortiori.

(U.S. Geological Survey Bull. 719, 1921), quoting Ernest de K. Leffingwell, *The Canning River Region, Northern Alaska* 178-79 (U.S. Geological Survey Professional Paper 109, 1919). See also P.S. Smith & J.B. Mertie, Jr., *Geology and Mineral Resources of Northwestern Alaska* 274-80 (U.S. Geological Survey Bull. 815, 1930) (summarizing information acquired through 1926).

⁷⁰ Even the Bureau of Mines' letter, in a passage quoted by Alaska, recognizes that oil fields might occur near the coast:

In the further judgment of officers of the Geological Survey and the Land Office most familiar with the region and who have been consulted, it is probable that the seepages themselves are in or from recent sands too unconsolidated to hold large quantities of oil and that the important fields are likely to be found either deeper or further back from the coast or both. Practical oil men familiar with the reports of competent private geologists who have studied parts of the field tell me that there is reason to believe that oil fields of first magnitude may seriously be expected to develop somewhere on this Arctic slope.

Ak. Ex. 82 (emphasis added).

Accordingly, I interpret the Executive Order to include all lands under tidally influenced waters inside the boundary as part of the Reserve.⁷¹

5. *Intention to defeat state title*

There remains the question whether there was affirmative intent to defeat the future State's title to submerged lands in the Petroleum Reserve. This is the second test of *Utah*, *supra* section D(2). In *Utah* itself, the Court needed to consider only prestatehood legislation as conceivably showing an intention to defeat Utah's claim to the lake bed. See 482 U.S. at 208-09. Here, in contrast, the United States relies on the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339

⁷¹ The extent of the 1923 reservation is of course not affected by later legislation. Later legislation is, however, quite consistent with a comprehensive reading of the 1923 reservation. The Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, § 102, 90 Stat. 303 (codified as amended at 42 U.S.C. § 6502 (1988)), provided:

The area known as Naval Petroleum Reserve Numbered 4, Alaska, established by Executive order of the President, dated February 27, 1923 . . . shall be transferred to and administered by the Secretary of the Interior . . . [A]ll lands within such area shall be redesignated as the "National Petroleum Reserve in Alaska" Subject to valid existing rights, all lands within the exterior boundaries of such reserve are hereby reserved and withdrawn from all forms of entry and disposition under the public land laws

According to the conference report on the 1976 Act, the withdrawal provision was intended "to override the unexpected interpretation" of the 1923 Executive Order in *Arnold v. Morton*, 529 F.2d 1101 (9th Cir. 1976). H.R. Conf. Rep. No. 942, 94th Cong., 2d Sess. 20, reprinted in 1976 U.S. Code Cong. & Admin. News 516, 522. The *Arnold* case had held that lands inside the Reserve boundary that were covered by valid entry, lease, or application in 1923 did not become part of the Reserve when the claims expired.

(1958), reprinted as amended in 48 U.S.C. note preceding § 21 (1988).⁷²

The Statehood Act was clearly meant to be the controlling document regarding property rights as between Alaska and the United States. Section 4 of the Act begins:

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States

Section 5 provides:

The State of Alaska and its political subdivisions, respectively, shall have and retain title to all property, real and personal, title to which is in the Territory of Alaska or any of the subdivisions. Except as provided in section 6 hereof, the United States shall retain title to all property, real and personal, to which it has title, including public lands.

Section 6 makes exceptions for numerous categories of federal property to be transferred to the State. The exception relevant here is section 6(m), making the Submerged Lands Act applicable to Alaska. Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-1315 (1988)).

Insofar as the Submerged Lands Act deals with lands subject to the equal footing doctrine, it confirms the states'

⁷² Alaska argues, as it did of the first *Utah* test, that the intent to defeat state title must be that of Congress itself. See *supra* pages 404-06. Because the United States relies on acts of Congress, it is unnecessary to pass on this point.

rights to receive lands under their inland navigable waters at statehood. The Act also grants additional submerged lands to the states. Both types of lands are covered by section 3 of the Submerged Lands Act, which provides that title to lands beneath navigable waters within the state boundaries is "recognized, confirmed, established, and vested in and assigned to" the states. § 3(a), 43 U.S.C. § 1311(a).

Like the equal footing doctrine, the Submerged Lands Act is subject to exceptions. Section 5 states: "There is excepted from the operation of section 3 of this Act . . . all lands expressly retained by . . . the United States when the State entered the Union . . ." § 5(a), 43 U.S.C. § 1313(a). Thus, if Congress "expressly retained" submerged lands in the Reserve at Alaska's statehood, that would be strong evidence that it intended to defeat Alaska's title.

The United States points to section 11(b) of the Alaska Statehood Act as an express retention. Section 11(b), which authorizes exclusive federal legislative jurisdiction over certain lands, states in part:⁷³

Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States and held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4

⁷³ For general background on federal legislative jurisdiction over federal land, see U.S. Public Land Law Review Comm'n, *One Third of the Nation's Land* 277-79 (1970).

Section 11(b), in referring to the Reserve as "owned by the United States," clearly contemplates continued federal ownership of the Reserve. Alaska contends, however, that although the uplands remain in federal ownership, the section shows no such intent as to submerged lands. Alaska also refers to two provisos to section 11(b), which are as follows:

Provided . . . (ii) that the reservation of authority in the United States for the exercise by the Congress of the United States of the power of exclusive legislation over the lands aforesaid shall not operate to prevent such lands from being a part of the State of Alaska, or to prevent the said State from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority and which is consistent with the laws hereafter enacted by the Congress pursuant to such reservation of authority; and (iii) that such power of exclusive legislation shall rest and remain in the United States only so long as the particular tract or parcel of land involved is owned by the United States and used for military, naval, Air Force, or Coast Guard purposes. . . .

Regarding proviso ii, Alaska notes that concurrent state jurisdiction is provided unless Congress enacts laws to the contrary, and it says that this includes jurisdiction over submerged lands. Regarding proviso iii, Alaska notes that the Reserve was transferred by 1976 legislation from the Navy to the Secretary of the Interior. Naval Petroleum Reserves Production Act of 1976, § 102, *supra* note 71. Thus, Alaska says that the Reserve is no longer used for military or naval purposes and that, under proviso iii, full jurisdiction has reverted to the State.

Both the provisos go to jurisdiction over the lands in the Reserve, not to ownership. The uplands and submerged

lands alike were included, under the main clause of section 11(b), in "such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States . . . including naval petroleum reserve numbered 4." Nothing in section 11(b) suggests that different jurisdictional patterns were to apply within the Reserve depending on whether the lands were upland or submerged.

As to whether different ownership patterns were to apply, the parties have cited the legislative history of the Statehood Act and other acts passed by the same Congress. One of these acts authorized prestatehood oil and gas leasing of Alaskan submerged lands. Act of July 3, 1958, Pub. L. No. 85-505, 72 Stat. 322.⁷⁴ As passed by the House, the bill applied to all Alaskan lands beneath inland navigable waters,

⁷⁴ Leasing was to be by the Secretary of the Interior, under the Mineral Leasing Act of 1920. Ninety percent of the revenues were to go to the Territory of Alaska. After statehood, the United States' rights in any leases were to be transferred to Alaska.

The Interior Department, which proposed the legislation in May 1957, explained its object as follows:

It is very important to the future of the Territory of Alaska that some authority be established under which the lands lying beneath inland navigable waters, such as bays, estuaries, lakes, and rivers may be leased for oil and gas. At the present time neither the Federal Government nor the Territory has authority to lease these water-covered areas, the title to which is held by the United States in trust for the benefit of a future State or States. The Federal Government leases only the land areas bordering upon inland navigable waters. Consequently, parties holding leases on areas bordering on such inland bodies of navigable water may, if a producing field is discovered, drain oil and gas from the water-covered areas. Alaska thus loses income to which it will one day presumably be entitled since it is expected that title to the water-covered areas will vest in Alaska upon its admission to the Union as a State.

S. Rep. No. 1720, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S. Code Cong. & Admin. News 2893, 2898-99.

including offshore areas like bays and tidelands as well as nontidal waters in the interior. H.R. 8054, 85th Cong., 1st Sess. § 1, 103 Cong. Rec. 13,612-13 (1957). The bill provided for leasing even within federal reservations. *See id.*, § 5. It did not mention the Petroleum Reserve, presumably because the naval petroleum reserves were already generally excluded from the Mineral Leasing Act. Mineral Leasing Act of 1920, ch. 85, § 1, 41 Stat. 437, as amended by the Act of Aug. 8, 1946, ch. 916, § 1, 60 Stat. 950 (current version at 30 U.S.C. § 181 (1988)).

At Senate hearings, the question arose whether the Petroleum Reserve was adequately protected. Senator Anderson of New Mexico asked:

Does this bill take any recognition of the fact that the whole northern part of Alaska is set aside for a naval reserve? Does this allow you to go out and lease offshore from a naval reserve and drain that area?

Alaskan Submerged Lands: Hearings on H.R. 8054 Before the Senate Comm. on Interior and Insular Affairs, 85th Cong., 2d Sess. 28 (1958). Senator Jackson of Washington read into the record a memorandum from counsel:

Naval Petroleum Reserve No. 4 should be protected. The bill does not specifically prevent applications for oil leases on the Arctic coast tidelands abutting Naval Petroleum No. 4. It cannot be intended to allow such an encroachment in this area.

Id. at 29. In the bill reported by the Senate committee, leasing authority for tidal waters was deleted, restricting its operation to navigable lakes and streams. S. Rep. No. 1720, *supra* note 74. From the Senators' remarks, it was clearly assumed that lakes and streams inside the Reserve would not be subject to leasing. The bill was enacted with the Senate committee amendment, 104 Cong. Rec. 11,900, 12,256-57

(1958), and was approved on July 3, 1958, only four days before the Alaska Statehood Act. For the policy of the Statehood Act to be consistent with that of the 1958 Leasing Act, the Statehood Act too must have assumed that submerged lands in the Reserve would remain the property of the United States.⁷⁵

The same conclusion is suggested by an act of September 7, 1957, Pub. L. No. 85-303, 71 Stat. 623, which granted

⁷⁵ Alaska has cited an earlier Senate hearing on the same legislation for the proposition that Congress expected all lands under navigable waters to pass to Alaska at statehood. The passage cited reads as follows:

Mr. HOFFMAN [minerals staff officer, Bureau of Land Management]. . . . [T]his bill provides under the Mineral Leasing Act Alaska would get 90 percent of the income of that 12 1/2 percent [royalty] or 5 percent [royalty], whichever the case may be, and of the rentals.

As to navigable waters if Alaska goes into statehood they would get 100 percent of the navigable waters.

Senator BARRETT. That is my understanding up to now.

Hearing before the Subcomm. on Territories of the Senate Comm. on Interior and Insular Affairs, 85th Cong., 1st Sess. (1957), printed in *Alaskan Submerged Lands: Hearings on H.R. 8054 Before the Senate Comm. on Interior and Insular Affairs*, 85th Cong., 2d Sess. 117, 124 (1958). In context, it seems clear that "100 percent" did not refer to what submerged lands Alaska would receive at statehood but to what its share of the royalties would be on leases issued under the Act. See *supra* note 74. The point was restated less elliptically later in Mr. Hoffman's testimony:

Senator BARRETT. Mr. Hoffman, who owns the oil and gas under the navigable waters of the Territory of Alaska at the present time?

Mr. HOFFMAN. It is held in trust by the United States for the better of the future State in Alaska.

Senator BARRETT. Not for the Territory of Alaska?

Mr. HOFFMAN. Not for the Territory. The Territory can only get what you in Congress provide by law, as in this case, it gives them 90 percent.

When it becomes a State it will be entitled to the 100 percent under navigable waters.

Alaskan Submerged Lands, supra, at 128.

title to certain lands beneath tidal waters to the Territory of Alaska.⁷⁶ The grant in the 1957 Act covered lands in Alaska "including improvements thereon and natural resources thereof, lying offshore of surveyed townsites in the Territory between the line of mean high tide and the pierhead line." § 2(a).⁷⁷ Excepted from the grant were "all oil and gas

⁷⁶ The committee reports explained the object of the 1957 Act as follows:

By the act of May 14, 1898 (30 Stat. 409; 48 U.S.C., sec. 411) [the Alaska Right of Way Act, now at 43 U.S.C. § 942-1] the tidelands in Alaska . . . were reserved for the future State and consequently they can be disposed of only at the direction of Congress. By the same act, the Department of the Interior was designated to administer the lands but without the authority to dispose of them, to lease them, or to grant, in any permanent form, permission to use them. . . .

Over the years there has been considerable development in southeast Alaska on fills and pilings over the tidelands and even beyond over the submerged lands. Included among these improvements are not only docks and warehouses but also streets, hotels, stores, schools, and private residences, most of which are in Juneau, Ketchikan, Cordova, and Valdez. . . .

Actually, under existing statutes, many of the structures constitute trespass because of the lack of authority to legalize the occupancy of the lands where permanent improvements are involved. While bringing trespass charges against the owners would eliminate the structures, a substantial portion of Alaska's real-property assets would be destroyed without serving the desired purpose. Moreover, a substantial source of revenue to the Territory is being lost because there is no authority for the administration of the tidelands and, consequently, no rentals are being paid or purchase fees collected because no patents can be issued. Private investors refuse to interest themselves in property or construction under these circumstances.

H.R. Rep. No. 950, 85th Cong., 1st Sess. (1957); S. Rep. No. 1045, 85th Cong., 1st Sess. (1957), reprinted in 1957 U.S. Code Cong. & Admin. News 1933.

⁷⁷ The "pierhead line" was defined as a line parallel to the line of mean low tide and far enough offshore to encompass certain manmade structures. § 1(b).

deposits located in the submerged lands along the Arctic coast of naval petroleum reserve numbered 4 between the line of mean high tide and the pierhead line." § 3(d).⁷⁸ Thus this Act too evidences the assumption that resources in submerged lands in or adjacent to the Reserve were to be protected.⁷⁹ Again, if under the Statehood Act passed ten months later submerged lands within the Reserve were to go to the State, there would have been a silent change of congressional policy.

Alaska has referred to Senate committee reports on both these statutes to show that the 85th Congress, the Congress that enacted the Statehood Act, was aware that submerged lands were held for the benefit of the future state. S. Rep. No. 1720, *supra* note 74, and S. Rep. No. 1045, *supra* note 76. It also quotes from earlier hearings on the Statehood Act, in which members of the same Senate committee made clear their awareness of the equal footing doctrine and its restatement in the Alaska Right of Way Act. *Alaska Statehood: Hearings on S. 50 Before the Senate Comm. on Interior and Insular Affairs*, 83th Cong., 2d Sess. 215-16, 223-25, 280-82 (1954). Alaska's argument, however, goes only to congressional awareness of the general rule regarding the treatment of submerged lands at statehood. It does not speak to whether Congress meant to make an exception to the general rule in the particular case of the Petroleum Reserve.

Alaska also notes that Congress was concerned about the

⁷⁸ The record does not reveal whether any surveyed townsites existed in the Reserve. However, the grant was also to extend to townsites that might be surveyed in the future. § 2(a).

⁷⁹ Where the Reserve boundary follows the highest high water mark along parts of the coast without lagoons, the strip described in the 1957 Act would lie just outside the Reserve. Where the Reserve boundary crosses water to include small lagoons and the area behind the Plover Islands, the strip would lie inside the boundary.

extent of federal withdrawals and reservations in Alaska, which were said to amount to 95 million acres, over a quarter of Alaska's total area. H.R. Rep. No. 624, 85th Cong., 1st Sess. 5-6 (1957), *reprinted in* 1958 U.S. Code Cong. & Admin. News 2933, 2937 (report accompanying the statehood bill). The Petroleum Reserve alone is about 23 million acres or 35 thousand square miles—nearly the size of Indiana. Joint Statement 17; Ak. Ex. 82; A 2d SRB 23. Nevertheless, Congress chose not to deal with that issue in the Alaska Statehood Act. In 1954, with the Navy's agreement, serious consideration was given to revoking the Petroleum Reserve entirely.⁸⁰ By 1955, the Administration's position had changed, with the Departments of Defense and the Interior both recommending retention of the Reserve.⁸¹ In 1957, specific mention of the Petroleum Reserve was written into what is now section 11(b) of the Statehood Act, at the suggestion of Administration witnesses.⁸² Indeed, the 85th Congress passed another statute restricting the executive power to withdraw public lands for defense purposes, but it specifically exempted withdrawals for naval petroleum reserves from the restrictions. Act of Feb. 28, 1958, Pub. L. No. 85-

⁸⁰ *Alaska Statehood: Hearings on S. 50 Before the Senate Comm. on Interior and Insular Affairs*, 83th Cong., 2d Sess. 165-66, 167-69, 191, 343-47, 349, 350 (1954).

⁸¹ *Alaska-Hawaii Statehood, Elective Governor, and Commonwealth Status: Hearings on S. 49, S. 399, and S. 402 Before the Senate Comm. on Interior and Insular Affairs*, 84th Cong., 1st Sess. 87-88 (1955); *Hawaii-Alaska Statehood: Hearings on H.R. 2535, H.R. 2536, and Related Bills Before the House Comm. on Interior and Insular Affairs*, 84th Cong., 1st Sess. 223 (1955).

⁸² See *Alaska Statehood: Hearings on S. 49 and S. 35 Before the Senate Comm. on Interior and Insular Affairs*, 85th Cong., 1st Sess. 2, 4 (1957); *Statehood for Alaska: Hearings on H.R. 50 and Other Bills Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 85th Cong., 1st Sess. 104 (1957).

337, § 1(2), 72 Stat. 27 (codified at 43 U.S.C. § 155(2) (1988)).

Reading the Alaska Statehood Act in the light of the other statutes enacted by the same Congress, I conclude that Congress intended to retain the submerged lands in the Petroleum Reserve for the United States and to defeat Alaska's title to those lands.

6. *The scope of the rights retained*

I have found above that a federal reservation of submerged lands, under appropriate circumstances, may remain effective beyond statehood without violating the equal footing doctrine. I have also found that such a reservation was accomplished with respect to the National Petroleum Reserve-Alaska. Alaska argues further that, even if the Reserve includes submerged lands,

state ownership of those submerged lands is qualified only to a limited extent. . . . [T]he federal government reserved rights to the oil, gas and other hydrocarbon resources. However, title (including unrestricted ownership of other subsurface resources) passed to the state.

ASB 20; see Tr. 2472-77, 2480-82.

Alaska's theory is based both on the equal footing doctrine and on the terms of the 1923 Executive Order. In the Executive Order, Alaska points to the final paragraph:

The reservation hereby established shall be for oil and gas only and shall not interfere with the use of the lands or waters within the area indicated for any legal purpose not inconsistent therewith.

As to the equal footing doctrine, Alaska says:

Even in the face of an international duty or public exigency, the equal footing doctrine requires that all of the attributes of ownership which are not directly implicated

in that duty or exigency must pass to the state, and even those attributes directly implicated must be presumed to pass to the state. The burden is then on the United States to demonstrate by clear and convincing evidence which severable rights of ownership, if any, were retained by virtue of the withdrawal or reservation. Any and all other rights of ownership, of necessity, pass to the new state to minimize the impact of the federal government's retention of certain ownership rights on the new state's sovereignty.

ASB 18. As a corollary, it concludes that "once the international duty or public exigency no longer exists and a withdrawal or reservation is revoked," the state's rights ripen "into full fee simple title." ASB 19 n.8.⁸³

The United States responds that Alaska's interpretation of the equal footing doctrine is unprecedented, and it explains the clause quoted from the Order as bearing on the purpose of the Reserve rather than its scope. See Tr. 2433-35, 2505-09. The scope is said to be fixed by an earlier paragraph setting apart "all of the public lands" within the described area, not simply the petroleum rights, as a naval petroleum reserve. For uplands in the Reserve, the paragraph regarding oil and gas is said "merely [to] indicate the extent to which

⁸³ Alaska likens its theory to the theory adopted by the Court in *Beecher v. Wetherby*, 95 U.S. 517 (1877). There, the United States had granted lands to the State of Wisconsin subject to the existing occupancy of the Menomonee Indians. The Court characterized the grant as conveying "only the naked fee" to the State. *Id.* at 525. It added that "[t]he possession, when abandoned by the Indians, attaches itself to the fee without further grant." *Id.* at 526, quoting *United States v. Cook*, 86 U.S. (19 Wall.) 591, 593 (1873). Consequently, a later United States patent of the same lands was invalid.

Beecher v. Wetherby did not, however, have to do with submerged lands or the equal footing doctrine. The statutes and cases that do deal with these matters are described in the text.

the United States has chosen to disable leases and other permissions for private exploration and exploitation of the area and [to] have no bearing on the degree of the title remaining in the United States." Tr. 2434. The United States reasons that the paragraph should be given the same interpretation for submerged lands as for the uplands. *Id.* It notes also that section 11(b) of the Statehood Act refers to the Reserve not in terms of oil and gas rights but as "land . . . owned by the United States" and as subject to exclusive legislative jurisdiction of the United States.

Although Alaska's argument appears plausible on first examination, I believe its interpretation of the rights retained by the United States would be contrary to the policies expressed in both the Statehood Act and the Submerged Lands Act. The Submerged Lands Act, made applicable to Alaska by section 6(m) of the Statehood Act, contemplates that mineral rights are not to be separated from the fee. The Submerged Lands Act defines "natural resources" to include oil and gas. § 2(e), 43 U.S.C. § 1301(e). It then states in section 3:

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of *the lands beneath navigable waters* within the boundaries of the respective States, *and the natural resources within such lands and waters*, and (2) the right and power to manage, administer, lease, develop, and use *the said lands and natural resources* . . . be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States

(b) (1) The United States hereby releases and relinquishes unto said States . . . , except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to *all said lands, improvements, and natural resources*

§ 3, 43 U.S.C. § 1311 (emphasis added). Thus the Act treats lands and their natural resources together, unless some separation results from the phrase "except as otherwise reserved herein." The exceptions are covered by section 5 of the Act:

There is excepted from the operation of section 3 of this Act—

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State . . . ; all lands expressly retained by . . . the United States when the State entered the Union

§ 5, 43 U.S.C. § 1313. To hold that the United States retained only oil and gas rights in submerged lands in the Reserve, it would be necessary to read "lands expressly retained" as covering the oil and gas rights but not the lands themselves. This would be a surprising interpretation, at best.

The same result follows from section 6(i) of the Alaska Statehood Act, which provides: "All grants made or confirmed under this Act shall include mineral deposits. . . ." Transfers of submerged lands to Alaska at statehood are surely "grants made or confirmed" under section 6(m) of the Statehood Act.⁸⁴ In effect Alaska is claiming lands without the oil and gas deposits, contrary to section 6(i). Although

⁸⁴ Alaska's equal footing rights, being constitutional in stature, would no doubt exist whether or not the Statehood Act confirmed them. If the Statehood Act did not confirm them, however, there would be difficulties with the constitutionality of Statehood Act sections 4 and 5. By section 4 (together with the Alaska Constitution, art. XII, § 12), Alaska disclaims all United States property "not granted or confirmed to the State . . . by or under the authority of this Act" By section 5, the United States retains title to all its property not dealt with otherwise in section 6. See *supra* page 431.

section 6(i) was no doubt included in the Statehood Act for Alaska's benefit, it does not become inapplicable merely because it happens to work to Alaska's detriment in this instance.

Alaska's remaining claim must be that equal footing requires a splitting of the ownership of submerged lands, notwithstanding any statutory provisions to the contrary. I do not find support in the cases for this position. In *Utah*, both the majority and the dissent assumed that either the United States had retained full rights to the bed of Utah Lake or the lake bed had passed to the State. On Alaska's analysis there would have been a third possibility: that the United States had retained the rights to the lake bed only so far as they were implicated in its use as a reservoir. The dispute in *Utah* arose when the United States issued oil and gas leases on the lake, but neither opinion suggested that the oil and gas rights might have passed to the State even if the United States had retained the lake bed for reservoir purposes.⁸⁵ Nor was it suggested that a post-statehood revocation of a reservation might in itself change the rights of the parties.⁸⁶

⁸⁵ In the court of appeals, Utah argued that the 1888 Act authorized withdrawal of only the surface estate in the bed of Utah Lake and that the mineral estate, if not reserved or withdrawn, passed to Utah at statehood. The Tenth Circuit rejected this interpretation of the 1888 Act, and it found no distinction between the surface and mineral estates in subsequent documents. *Utah v. United States*, 780 F.2d 1515, 1523 (10th Cir. 1985), *rev'd on other grounds sub nom. Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987).

⁸⁶ Justice White, who would have held that the United States retained title to the lake bed at Utah's statehood, said: "[I]f Congress later determines that the lands are no longer needed by the Federal Government for a public purpose, it can at that time transfer title to the State." 482 U.S. at 210.

The Solicitor of the Interior has also taken the position that, when a withdrawal of submerged lands is revoked after statehood, title does not thereupon vest in the state. The Solicitor relied on section 5(a) of the

Instead, the Court adjusted conflicting state and federal interests by introducing the new requirement of a showing that a federal reservation of submerged lands was affirmatively intended to defeat the future state's title. This adjustment has the advantage, over a splitting of rights, of not raising new questions for the courts regarding regulatory authority, rights of use and occupancy, and whether the time for revocation has come.

I therefore find that the United States has retained full ownership, and not merely the oil and gas rights, in the submerged lands of the Reserve.

F. Conclusion

I conclude that lands under tidally influenced waters inside the boundary of the National Petroleum Reserve-Alaska are part of the Reserve and so belong to the United States. To the extent that these lands underlie inland waters, I found above that the circumstances of the Reserve were sufficient to overcome the strong presumption, as spelled out in *Montana* and *Utah*, that title passed to Alaska at statehood. To the extent that the lands underlie territorial waters, I found that the presumption of *Montana* and *Utah* does not apply. As to these lands, the result therefore follows a fortiori.

The following comments relate this conclusion to my findings regarding the Reserve boundary.

a. Question 7. Harrison Bay and Smith Bay are not part of the National Petroleum Reserve-Alaska, *see supra* page 352, and so are not affected by the conclusion.

b. Question 8. Peard Bay is inside the boundary of the

Submerged Lands Act, excepting from transfer "all lands expressly retained by . . . the United States when the State entered the Union" Solicitor's Opinion, 86 Interior Dec. 151, 174 (1978) (Solicitor's emphasis), *supplemented and modified*, 100 Interior Dec. 103 (1992) (addressing the question in terms of intent to defeat state title).

Reserve, *see supra* page 364, and therefore is part of the Reserve.

c. Question 11. Many, if not all, of the inlets, bays, and river estuaries disputed in question 11 are inside the Reserve boundary. *See supra* pages 380-81. To the extent that these areas are inside the boundary, they are also part of the Reserve.

d. Other tidally influenced waters, such as Elson Lagoon and Kasegaluk Lagoon, are concededly inside the Reserve boundary. *See supra* page 366. These areas are also part of the Reserve.

IX

THE ARCTIC NATIONAL WILDLIFE REFUGE

In November 1957, for the purpose of establishing an Arctic Wildlife Range, the Bureau of Sport Fisheries and Wildlife applied to the Secretary of the Interior for an order withdrawing a large area of public lands in the northeastern corner of Alaska.¹ Notice of the application was published

¹ The application, dated November 18, 1957, was as follows:

To: Secretary of the Interior

Through: Manager, Land Office
Bureau of Land Management
Fairbanks, Alaska

From: Director, Bureau of Sport Fisheries and Wildlife

Subject: Application for withdrawal by public land order

In accordance with the provisions of Departmental Circular No. 1982 of August 12, 1957 (43 CFR 295.9-295.15), application is made for the withdrawal of the public lands in Alaska described in the attachment marked "Exhibit A." The withdrawal should be made subject to the provisions of existing withdrawals and to valid existing rights in and to the lands described.

The agency applying for this withdrawal is the Bureau of Sport Fisheries and Wildlife, Department of the Interior.

The purpose of this withdrawal is to establish an Arctic Wildlife Range within all or such portion of the described lands as may be finally determined to be necessary for the preservation of the wildlife and wilderness resources of that region of northeastern Alaska.

A statement of the justification for the proposed withdrawal and the need for all the land requested is contained in the attached copy of a memorandum of November 7, 1957, from this bureau to the Director of the Bureau of Land Management.

It is desired that the withdrawal preclude all forms of appropriation under the public land laws. Mineral leasing will be permitted on and after September 1, 1958, in accordance with such regulations as on that date govern oil and gas leasing on Federal wildlife lands. Mining locations should be precluded until on and after September 1, 1958.

The hunting and taking of game animals and game birds and the

in the *Federal Register* in January 1958. 23 Fed. Reg. 364 (1958).²

At the time of the application, Alaska was still a territory. The Alaska Statehood Act was passed in July 1958, and a presidential proclamation admitting Alaska to the Union followed in January 1959. Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), *reprinted as amended* in 48 U.S.C. note preceding § 21 (1988); Proclamation No. 3269,

trapping of fur animals will be permitted in accordance with the regulations of the Secretary of the Interior prescribed and issued pursuant to the provisions of the Alaska Game Laws, as amended.

This withdrawal should be made under the inherent authority of the President, delegated to the Secretary of the Interior by Executive Order No. 10355.

U.S. Ex. 9, Ak. Ex. 81.

² The notice read:

ALASKA
NOTICE OF PROPOSED WITHDRAWAL
AND RESERVATION OF LANDS

January 14, 1958.

Bureau of Sport Fisheries and Wildlife has filed an application, Serial No. Fairbanks 017050, for the withdrawal of the land described below, from all forms of appropriation under the public land laws. Mineral leasing will be permitted on and after September 1, 1958, in accordance with such regulations as on that date govern oil and gas leasing on Federal wildlife lands. Mining locations will be precluded until on and after September 1, 1958.

The hunting and taking of game animals and game birds and the trapping of fur animals will be permitted in accordance with the regulations of the Secretary of the Interior prescribed and issued pursuant to the provisions of the Alaska Game Laws, as amended.

The applicant desires the land for an Arctic Wildlife Range for the preservation of the wildlife and wilderness resources of northeastern Alaska.

For a period of 60 days from the date of publication of this notice, persons having cause may present their objections in writing to the

3 C.F.R. 4 (1959-1963), *reprinted* in 48 U.S.C. note preceding § 21, at 15 (1988).

At Alaska's statehood the application for withdrawal was still pending before the Secretary of the Interior. Nearly two years after statehood, in December 1960, the Secretary issued Public Land Order 2214, withdrawing the lands and establishing the Arctic National Wildlife Range. 25 Fed.

undersigned official of the Bureau of Land Management, Department of the Interior, Box 480, Anchorage Alaska.

If circumstances warrant it, a public hearing will be held at a convenient time and place, which will be announced.

The determination of the Secretary on the application will be published in the Federal Register. A separate notice will be sent to each interested party of record.

The lands involved in the application are:

Beginning at the Intersection of the International Boundary line between Alaska and Yukon Territory, Canada, with the line of extreme low water of the Arctic Ocean in the vicinity of Monument 1 of said International Boundary line;

Thence westerly along the said line of extreme low water, including all offshore bars, reefs, and islands to a point of land on the Arctic Seacoast known as Brownlow Point, at approximate longitude 145°51' W. and latitude 70°10' N.;

Thence in a southwesterly direction approximately three (3) miles to the mean high water mark of the extreme west bank of the Canning River;

Thence southerly up the said west bank of the Canning River along the mean high water mark

.....
Thence north with the said International Boundary line approximately one hundred (100) miles to the point of beginning.

Containing approximately 6,400,000 acres.

L. T. MAIN,
Operations Supervisor, Anchorage.

23 Fed. Reg. 364 (1958).

Reg. 12,598 (1960).³ So far as relevant, the lands described in the application and in the public land order are the same.⁴ The northern part of the Range, which extends from the Canadian boundary on the east to Brownlow Point and the Canning River on the west, is shown in figures 1.1, 9.1, and 9.2.

³ Public Land Order 2214, 25 Fed. Reg. 12,598, provides:

ALASKA

Establishing the Arctic National Wildlife Range

By virtue of the authority vested in the President, and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

1. For the purpose of preserving unique wildlife, wilderness and recreational values, all of the hereinafter described area in northeastern Alaska, containing approximately 8,900,000 acres is hereby, subject to valid existing rights, and the provisions of any existing withdrawals, withdrawn from all forms of appropriation under the public land laws, including the mining but not the mineral leasing laws, nor disposals of materials under the Act of July 31, 1947 (61 Stat. 681; 30 U.S.C. 601-604), as amended, and reserved for use of the United States Fish and Wildlife Service as the Arctic National Wildlife Range;

... [boundary description as in the 1958 notice, *supra* note 2]

2. The Secretary of the Interior is authorized to permit the hunting and the taking of game animals, birds, and fish in the wildlife range, or parts thereof, as well as the trapping of fur animals. However, no person may hunt, trap, capture, kill, or willfully disturb any wild mammal, wild bird, or fish or take or destroy the eggs or nests of any such bird or fish within the wildlife range, except as may be prescribed by the Secretary. The provisions of State law shall govern all hunting and taking of wildlife which the Secretary of the Interior permits under the terms of this order.

FRED A. SEATON,
Secretary of the Interior.

December 6, 1960.

⁴ Although the estimated area of the Range was changed from 6.4 million acres in the notice of application to 8.9 million acres in the public land order, *see supra* notes 2-3, the lower figure was simply a mistake. Tr. 56-58; U.S. Exs. 16, 17; U.S. Ex. 24, at 1-2. The boundary descriptions in the two documents are identical except for trivial stylistic differ-

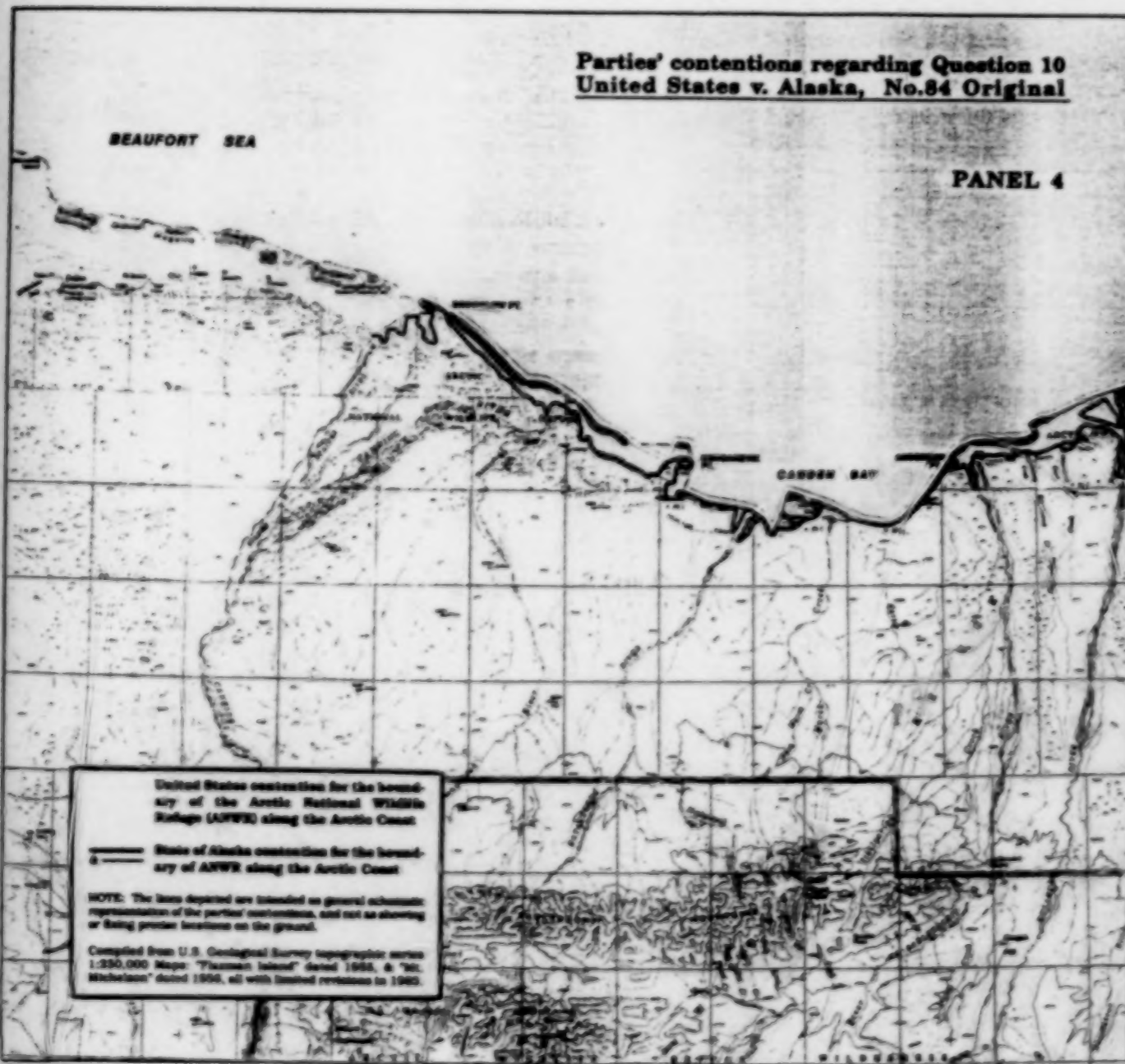


Figure 9.1

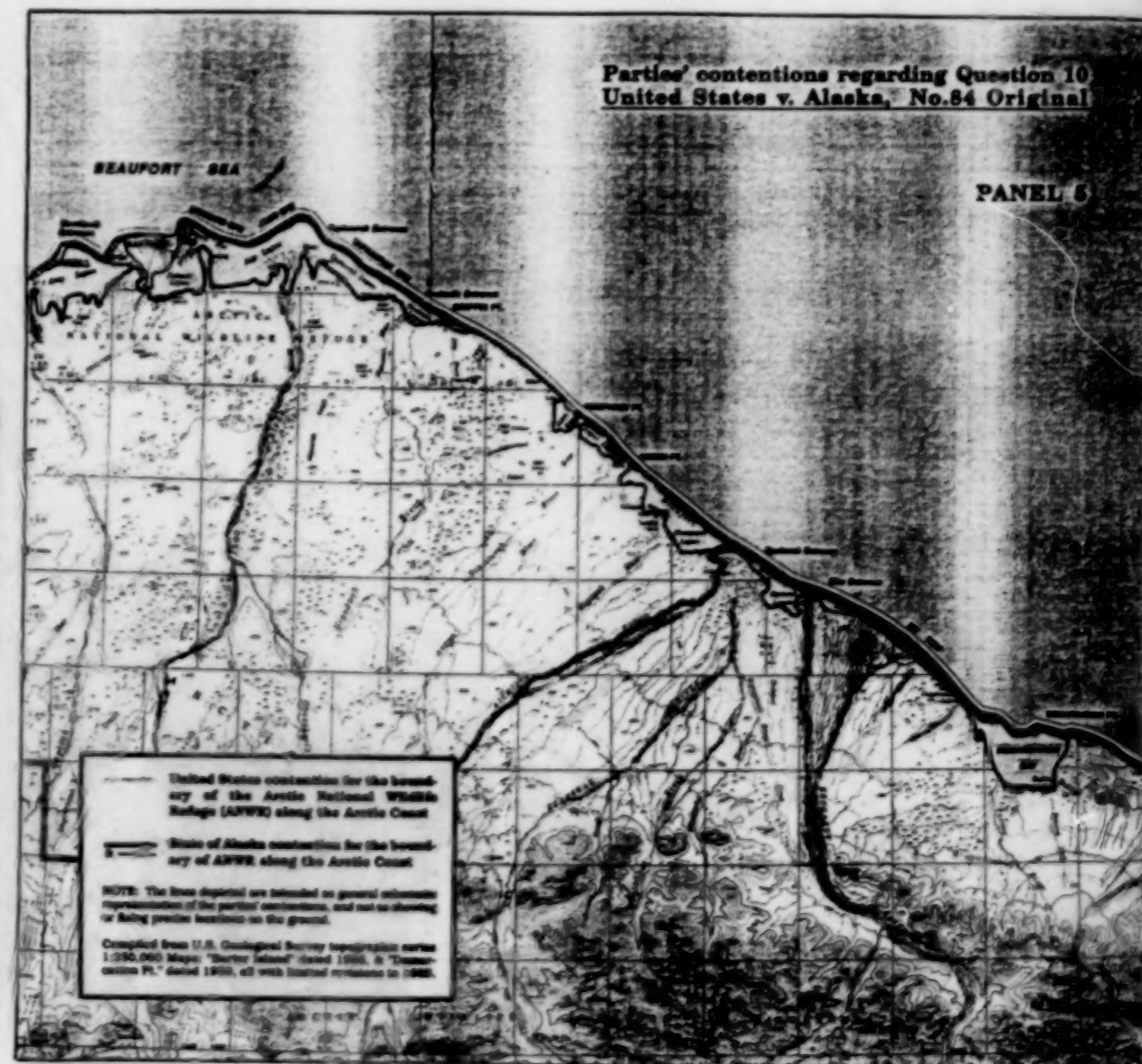


Figure 9.2

The name of the Range was changed to "Arctic National Wildlife Refuge" in 1980.⁵

A. The issues

The parties agree that the upland parts of the Arctic National Wildlife Range remained in federal ownership after Alaska's statehood. The disagreement concerns lands under navigable waters, which would otherwise have passed to Alaska at its admission to the Union. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845) (inland navigable waters); Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988) (navigable waters within three miles of a state's coastline). See generally section II, *supra*. In particular, the dispute before the Master concerns lands under tidally influenced waters, that is, lands at the north of the Range such as lagoons, tidelands, and river mouths.⁶ The Range boundary in these areas

ences and the apparent correction of a typographical error at one place along the inland boundary.

⁵ Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, § 303(2)(A), 94 Stat. 2371, 2390 (1980). In that Act Congress avoided taking a position on the present issues:

The Arctic National Wildlife Refuge shall consist of the existing Arctic National Wildlife Range including lands, waters, interests, and whatever submerged lands, if any, were retained in Federal ownership at the time of statehood and an addition of approximately nine million one hundred and sixty thousand acres of public lands, as generally depicted on a map entitled "Arctic National Wildlife Refuge", dated August 1980.

Id.

⁶ Because of facts specific to the Range, it will sometimes be appropriate in this part of the report to distinguish between tidelands and lands that are permanently submerged. Where the context does not call for such a distinction, phrases like "submerged lands" or "lands beneath tidally influenced waters" may be used to include both periodically and permanently submerged lands.

is defined in part as following the "line of extreme low water, including all offshore bars, reefs, and islands." In addition, the dispute is limited to the actions creating the Arctic National Wildlife Range; it does not concern any other withdrawals that may have covered some of the same lands.⁷

In their Joint Statement the parties submitted two questions concerning the lands. The United States will prevail only if both questions are answered in its favor.

Question 9 goes to the effectiveness of the application for withdrawal:

Did the application for withdrawal and creation of the Arctic Wildlife Range, filed in 1958 but not finally confirmed until 1960, effectively withhold from Alaska any offshore submerged lands included within the application?

Alaska argues that a mere application was insufficient. It also has argued that even a prestatehood public land order would have been insufficient to withhold the contested lands from the State. The United States, arguing that the application was effective to withhold submerged lands from Alaska, relies in part on an Interior Department regulation in force at the time of the application. According to this regulation, the application itself was enough to set the lands apart.⁸ The

⁷ For example, the Master has not been asked to consider the effect of Public Land Order 82, which in 1943 withdrew an overlapping area for use in connection with the prosecution of World War II. Public Land Order 82, 8 Fed. Reg. 1599 (1943), *revoked by* Public Land Order 2215, 25 Fed. Reg. 12,599 (1960). The Interior Department has interpreted Public Land Order 82 as not withdrawing offshore submerged lands. 86 Interior Dec. 151, 152 n.1, 175 (1978), *modified and supplemented in other respects*, 100 Interior Dec. 103 (1992).

⁸ The regulation provided:

§ 295.11 *Segregative effect of applications.* (a) The noting of the receipt of the application in the tract books or on the official plats maintained by the Land Office in which the application was properly

United States relies also on certain provisions of the Submerged Lands Act and the Alaska Statehood Act.

Question 10 goes to the interpretation of the application for withdrawal:

Assuming the acreage included in the 1958 application for the Arctic Wildlife Range was effectively withheld from Alaska, does the Range embrace the submerged lands between the mainland and the barrier islands in the area between the Canadian boundary and Brownlow Point?

Alaska contends that the language defining the Range boundary does not include the submerged lands between the mainland and the islands. It also contends that the boundary language excludes part of the beds of navigable rivers from the Range. The United States contends that the Range boundary runs along the seaward side of the barrier islands.

Questions 9 and 10 were heard, briefed, and argued along with the National Petroleum Reserve issues already discussed. *See supra* section VIII at 346-48. After the questions had been heard and briefed, the Court decided *Montana v. United States*, 450 U.S. 544 (1981). The *Montana* decision said that there is a strong presumption that lands under navigable waters pass to a new state when it enters the

filed . . . shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.

22 Fed. Reg. 6613, 6614 (Aug. 17, 1957); 43 C.F.R. § 295.11(a) (1954, Supp. 1962) (Ak. Ex. 77).

Union. It held that the bed of the Big Horn River passed to Montana at statehood even though it was inside the boundary of an Indian reservation created earlier. *See supra* section VIII(D)(2).

Montana prompted a joint motion by the parties for supplemental briefs. Joint Motion (Oct. 31, 1983); Stipulation of the Parties (Nov. 2, 1983). In response, the Master issued an order permitting briefs on the relevance of *Montana* "to the question of ownership of submerged lands underlying tidal lagoons within the exterior boundaries of the Arctic National Wildlife Range, if any, and within the exterior boundaries of the National Petroleum Reserve-Alaska." Order of Jan. 4, 1984. At oral argument, which followed the *Montana* briefing, the parties agreed that they wished the Master to consider all tidally influenced water bodies inside the boundary, not merely tidal lagoons. Tr. 2431-32, 2477. Accordingly, question 10 now covers two issues: the location of the boundary (the original question) and the rights to lands under tidally influenced waters inside the boundary (the *Montana* question).

In their *Montana* briefs, the parties also expanded on their argument of question 9. Alaska read *Montana* as supporting its view that even a secretarial order of withdrawal issued before statehood would not have kept submerged lands from the State; a fortiori the application for withdrawal did not do so. The United States replied that *Montana* supported no such reading.

The Court handed down another pertinent decision in *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987). There, the Court left open a question previously raised by Alaska: whether the Federal Government has the power, when a state enters the Union, to keep lands under navigable waters for itself. Assuming *arguendo* that the power existed, the Court said that two showings would have to be made to establish such a retention: a clear intent to

include the submerged lands within the reservation and an affirmative intent to defeat the future state's title to the lands. On the facts of the case, the Court found that the Federal Government had not retained the bed of Utah Lake at Utah's statehood. *See supra* section VIII(D)(2).

A second supplemental briefing followed the decision in *Utah*. The arguments in the *Utah* briefs, like those in the *Montana* briefs, bear on both questions 9 and 10.⁹

B. Question 9: The effectiveness of the withdrawal application

As indicated above, the arguments on question 9 are at two levels. At one level, it is assumed that a completed withdrawal and reservation of submerged lands before Alaska's statehood would have prevented the passage of those lands to the State. The question is then whether an application for withdrawal has enough in common with a completed withdrawal that it has the same effect.

At the other level, Alaska argues that the assumption is incorrect. On Alaska's view, the lands in controversy would have passed to Alaska at statehood even if a public land order creating the Range had already been issued and even if the order were clearly intended to include submerged lands. I begin with this second argument.

1. Federal power to retain submerged lands

Alaska's position regarding the power of the United States over submerged lands is founded on the equal footing doctrine. This doctrine, first announced in *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), says that a new state, on admission to the Union, receives title to land beneath navigable waters within its boundaries.

⁹ For the abbreviations used for the three sets of briefs, *see supra* section VIII at 348 n.5.

I have already examined the development and scope of the equal footing doctrine at length, and I have treated the parties' arguments on that subject in detail. See *supra* section VIII(D)–(E)(2). It suffices here to summarize the conclusions:

1. There is a distinction between lands under navigable inland waters and lands under territorial waters within state boundaries. A state's equal footing rights extend only to the former. For lands under territorial waters, the states' rights are based on the Submerged Lands Act but not the equal footing doctrine. Section VIII(E)(1), *supra*.

2. During the territorial period, Congress can convey lands under navigable waters to a third party and thereby defeat the title of an eventual state. This power arises from the Property Clause of the Constitution (art. IV, § 3, cl. 2), which permits Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The power is limited by the requirement that the conveyance be for a "public purpos[e] appropriate to the objects for which the United States hold[s] the Territory." Section VIII(E)(2), *supra*, at 397 (quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 200–01 (1987), and *Shively v. Bowlby*, 152 U.S. 1, 48 (1894)).

3. During the territorial period, Congress can also reserve lands under navigable waters to the United States for an appropriate public purpose and can thereby defeat the title of an eventual state. Section VIII(E)(2), *supra*.

4. Although Congress thus has the power to prevent lands under inland navigable waters from passing to a new state, the exercise of the power is not to be lightly inferred. *Utah*, 482 U.S. at 197. For lands under territorial waters, in contrast, the applicable presumption is in favor of the United States. Section VIII(E)(1), *supra*.

A further issue is how the congressional power over sub-

merged lands in a territory may be exercised. Alaska has argued that only Congress itself can accomplish a federal withholding of submerged lands. I have found, however, that at least some aspects of congressional authority may be delegated. Section VIII(E)(3), *supra*, at 404–06. Accordingly, two questions arise. Did Congress itself act to withhold lands beneath navigable waters in the Arctic National Wildlife Range? If not, did the actions of the executive branch result in such a withholding? In section 2, I turn to the statutes that govern these questions. Then section 3 will take up considerations applicable to either a congressional or an executive withholding; section 4 will ask whether there was a congressional withholding; and section 5, whether an executive withholding took place.

2. The statutory framework

While Alaska was a territory, the United States held the rights to whatever lands under navigable waters were covered by the application for the Arctic Wildlife Range. When Congress authorized Alaskan statehood, it specified that in general "the United States shall retain title to all property, real and personal, to which it has title, including public lands." Alaska Statehood Act, Pub. L. No. 85-508, § 5, 72 Stat. 339, 340 (1958), *reprinted in* 48 U.S.C. note preceding § 21 (1988). Congress then provided several exceptions to this general rule.

The exceptions relevant here are sections 6(e) and 6(m) of the Alaska Statehood Act. Each of these sections is itself subject to exceptions.

Section 6(e) of the Statehood Act deals with fish and wildlife resources. The United States reads a proviso to this section as action by Congress itself to retain whatever submerged lands were included in the application for the Range. I shall return to section 6(e) shortly.

Section 6(m) of the Statehood Act deals with submerged lands. It provides:

The Submerged Lands Act of 1953 shall be applicable to the State of Alaska and the said State shall have the same rights as do existing States thereunder.

The Submerged Lands Act, in turn, says that "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States" are "recognized, confirmed, established, and vested in and assigned to the respective States." § 3(a), 43 U.S.C. § 1311(a). It is by means of the Submerged Lands Act that the Statehood Act provides for the transfer of lands under navigable waters, inland or territorial, to the new state.

Section 5 of the Submerged Lands Act, however, excepts from transfer to a state:

all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea)

§ 5(a), 43 U.S.C. 1313(a). Thus, any submerged lands covered by the application for the Arctic Wildlife Range might have been "expressly retained by" the United States when Alaska entered the Union.

The Submerged Lands Act does not say what branches of the Federal Government are competent to "expressly retain" submerged lands. Certainly Congress could retain them, and it is argued to have done so in the fish and wildlife section of the Statehood Act, section 6(e). An additional possibility is that executive action could amount to an express retention. Insofar as the Submerged Lands Act may countenance an executive retention of submerged lands, it provides a second possible basis for finding that such lands were withheld from Alaska.

3. General considerations

Certain facts about the Range are important to either theory of how submerged lands might have been retained at Alaska's statehood. Central is a regulation of the Department of the Interior that was in effect at the time of the application. 43 C.F.R. § 295.11(a), 22 Fed. Reg. 6613, 6614 (1957), quoted *supra* note 8. Under the regulation, noting of receipt of the application in the Land Office tract books temporarily segregated the lands from disposal under the public land laws to the same extent that the withdrawal or reservation applied for would have done. In the case of the Wildlife Range, the application was noted in the records of the Land Office at Fairbanks, Alaska, in November 1957, just after the application was filed. Tr. 53-55; U.S. Exs. 10, 11, 13, 85.¹⁰

The regulation thus gave some effect to the application for the Range. It did not amount to a granting of the application, which remained subject to the decision of the Secretary of the Interior and which was still pending before him at Alaska's statehood. One may therefore ask, under the United States' position, what would have become of any submerged lands covered by the application if the Secretary had rejected the application after statehood.

The United States has not addressed this question. Instead, it treats the question as unrealistic because, it observes, Secretary Seaton was in fact fully persuaded of the need for the Range.¹¹ Nevertheless, the Secretary's position

¹⁰ United States Exhibit 85 was mistakenly referred to as Exhibit 86 at Tr. 54.

¹¹ When the application was filed in November 1957, the Department issued a press release stating that the filing had been made at the Secretary's direction. U.S. Ex. 12 (Ak. Exs. 19, 57). The Secretary himself said that "after the application is handled in the usual manner . . . we intend to go forward with the establishment of this wildlife range." U.S. Ex. 32. Later (after statehood), the Secretary sent draft legislation to

was politically controversial.¹² He chose not to issue a public land order before Alaska's statehood, even though more than a year passed between the filing of the application in November 1957 and Alaska's admission in January 1959. Under these circumstances, the possibility of a poststatehood denial of the application cannot be simply dismissed.

Congress to create the Range by statute. U.S. Ex. 27 (Ak. Exs. 11, 56). (The object of this legislation was to permit mining in the Range on terms that existing law did not authorize the Secretary to impose.) When Congress failed to enact a bill, the Secretary established the Range by public land order and announced in a press release:

From time to time . . . he has stated that in the event the Congress was either unable or unwilling to act both to preserve in protected status the resource values in that area and to authorize limited mining and mineral leasing activity in a form and manner compatible with the basic purpose of the withdrawal, he would have to consider taking administrative action to create the new Range.

U.S. Ex. 34 (Ak. Exs. 13, 61).

¹² The Federal Register announcement of the application drew significant opposition within Alaska. The Fairbanks Bureau of Land Management, in a report dated April 11, 1958, indicated that it had received 57 communications about the Range, only three of which supported it. Ak. Ex. 20; U.S. Ex. 24. The Bureau itself argued that the Wildlife Range might hamper mineral development and that the region's remoteness, together with the Alaska game laws, would provide adequate wildlife protection. *Id.*

Shortly after statehood, the new Alaska legislature adopted a memorial expressing its opposition to the creation of the refuge. House Joint Memorial 23, 1959 Session Laws 434 (Mar. 17, 1959); see U.S. Ex. 36. Governor Egan wrote to Interior in opposition in both May and July 1959. Ak. Exs. 53, 55.

The administration bill, *supra* note 11, was introduced in Congress in 1959. In the House of Representatives, it was given a one-day hearing, reported without amendment, and passed without opposition. *Miscellaneous Fish and Wildlife Legislation: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 86th Cong., 1st Sess. 137-82 (1959); H.R. Rep. No. 771, 86th Cong., 1st Sess. (1959) (U.S. Ex. 28); 106 Cong. Rec. 2516

Assuming that the application covered some submerged lands, I am aware of no provision of law that would cause the lands to pass to Alaska upon denial of the application after statehood. The application and the regulation together would thus have accomplished a federal withholding of submerged lands from Alaska. Yet denial of the application would imply that there was no real need for the withholding or at least that any need was outweighed by other factors.

A congressional policy, found by the Court in a long line of cases, is that lands under navigable inland waters, "unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States" *Shively v. Bowlby*, 152 U.S. 1, 50 (1894). *Accord*, *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *Montana v. United States*, 450 U.S. 544, 552 (1981); *Utah Division of State Lands v. United States*, 482 U.S. 193, 197 (1987). See generally sections VIII(D) and (E)(4)(a), *supra*. Some of the lands at issue here clearly fall within the scope of this policy.¹³ It would violate the policy to hold that the application for the Wildlife Range kept such lands from Alaska at statehood even though the Secretary of the Interior might later determine that the lands were not needed.

It has been suggested that, if the application were denied,

(1960); H.R. 7045, 86th Cong., 2d Sess. (1960) (as passed House, U.S. Ex. 33). In the Senate, however, the Commerce Committee held eleven days of hearings in Washington and Alaska and did not report a bill. *Arctic Wildlife Range—Alaska: Hearings on S. 1899 Before the Merchant Marine and Fisheries Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong., 1st & 2d Sess., pts. I & II (1959-60).

¹³ Since the seaward boundary of the Range uses a line of extreme low water, tidelands are necessarily inside the boundary. Depending on the location of the boundary (question 10, *infra*), other inland waters inside the boundary may include the tidally influenced parts of rivers and any areas that qualify as juridical bays. I have found in section III, however, that the disputed areas are not inland waters merely because they are landward of barrier islands.

Alaska could have obtained title to the lands after statehood by selecting them under the Alaska Statehood Act. Solicitor's Opinion, 86 Interior Dec. 151, 176 (1978). See also 100 Interior Dec. 103, 118 n.43 (1992) (supplementing the 1978 opinion). Section 6(b) of the Statehood Act provides that Alaska "is hereby granted and shall be entitled to select" up to 102,550,000 acres of public lands. Nevertheless, such selections are subject to restrictions not applicable to the State's entitlement under the Submerged Lands Act and the equal footing doctrine.¹⁴

I therefore approach the Alaska Statehood Act and the Submerged Lands Act with some skepticism as to their support for the effectiveness of the application.

4. Congressional retention by Statehood Act § 6(e)

The United States argues that, by section 6(e) of the Alaska Statehood Act, Congress acted to retain whatever lands were covered by the application for the Arctic Wildlife Range. In particular, the United States relies on the italicized proviso:

All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 301; 48 U.S.C., Secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, shall be trans-

¹⁴ Tracts selected must meet requirements of compactness and minimum size; they are chargeable against the total acreage available for selection; and, for lands in the northernmost part of Alaska, selections must have presidential approval. Alaska Statehood Act § 6(b), (g).

ferred and conveyed to the State of Alaska by the appropriate Federal agency: . . . *Provided, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities used in connection therewith, or in connection with general research activities relating to fisheries or wildlife. . . .*

Alaska Statehood Act, Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 340 (1958), *reprinted as amended in 48 U.S.C. note preceding § 21 (1988) (emphasis added).*

It is not contended that the Range qualified at statehood as "lands withdrawn . . . as refuges or reservations for the protection of wildlife." The application for withdrawal was pending at statehood in January 1959, but it was not acted on until December 1960. The United States does contend, because of the regulation segregating the lands applied for, that the Range qualified at statehood as lands "otherwise set apart" within the meaning of section 6(e).

Alaska makes several responses to this contention:

1. That the departmental regulation was not intended to operate on submerged lands. Thus, even if the application for withdrawal covered submerged lands, they were not segregated by the regulation and so were not "otherwise set apart" within the meaning of section 6(e).

2. That, even if the regulation did reach submerged lands as well as uplands so that the lands were "otherwise set apart," they were not "otherwise set apart as refuges or reservations for the protection of wildlife."

3. That, even if the lands were "otherwise set apart as refuges or reservations for the protection of wildlife," the structure of the Statehood Act shows the proviso was not intended to prevent submerged lands from passing to the State.¹⁵

¹⁵ Alaska has also argued, citing hearings on legislation contemporaneous with the Statehood Act, that there is positive evidence that Con-

I find Alaska's second point controlling. The proviso to section 6(e) covers lands "withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." Although the application and the regulation together caused land to be set apart for the purpose of a wildlife reservation, it was not yet set apart *as* a refuge or reservation. It may be that the temporary segregation had essentially the same effect as a withdrawal of lands, in that both prevented disposition under the public land laws. But the segregation did not have the same effect as a reservation of lands, dedicating them to a specific public purpose.¹⁶ As the regulation itself states, the application did not affect administrative jurisdiction over the lands. *See supra* note 8. It was not until the Secretary approved the application after statehood that the Wildlife Range was established and jurisdiction was transferred from the Bureau of Land Management to the Fish and Wildlife Service.

The proviso to section 6(e), taken literally, thus applies only to wildlife refuges or reservations already established at statehood. One might still question whether this reading is the best one, since the words "otherwise set apart" do describe the effect of an application under the regulation.

The answer is that the history of the proviso shows no reason to reject its literal meaning. At the time the proviso was drafted, the regulation relied on by the United States did not yet exist. The proviso was first proposed by the Department of the Interior, in precisely its present form, in 1950. S. Rep. No. 1929, 81st Cong., 2d Sess. 12, 14 (1950).¹⁷ The

gress intended submerged lands in wildlife refuges to become Alaska's. As discussed earlier, I believe that Alaska misinterprets the cited testimony. Section VIII, *supra*, at 436 n.75.

¹⁶ For the terminology of withdrawals and reservations, *see supra* section VIII at 395 n.40.

¹⁷ Alaska statehood legislation was considered at every session of Congress from 1947 up until its enactment in 1958. For a partial bibliog-

Department's regulations providing for the segregative effect of an application for withdrawal were first promulgated in 1952. 17 Fed. Reg. 7368, 7677 (1952); 43 C.F.R. §§ 295.9-

raphy, *see* H. Rep. No. 624, 85th Cong., 1st Sess. 89-90 (1957), *reprinted in* 1958 U.S.C. Cong. & Admin. News 2933, 3005-07.

The proviso to what became section 6(e) was proposed in a letter of April 20, 1950, from Interior Secretary Oscar L. Chapman to Senator O'Mahoney, chairman of the Committee on Interior and Insular Affairs. The text of the letter included the following:

For the purpose of bringing about a division of the fish and wildlife activities now conducted by the United States in Alaska, along lines of demarcation conforming to the recognized distinctions between Federal and State functions, I recommend adoption of the following amendment to section 5 of the bill:

On page 9, lines 1 to 9, strike out the following:

"All the property of the United States situated in the Territory of Alaska used in connection with the conservation and protection of the fisheries and of the fur and game of Alaska is hereby transferred and conveyed to the State of Alaska. The State of Alaska shall possess and exercise the same jurisdiction and control over the fisheries and the fur and game of Alaska as are possessed and exercised by the several States within their respective territorial limits, including adjacent waters."

and insert in lieu thereof the following:

"All real and personal property of the United States situated in the Territory of Alaska which is used in connection with the conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 (57 Stat. 302; 48 U.S.C., secs. 192-211), as amended, and under the provisions of the Alaska commercial fisheries laws of June 26, 1906 (34 Stat. 478; 48 U.S.C., secs. 230-239 and 241-242), and June 6, 1924 (43 Stat. 465; 48 U.S.C., secs. 221-228), as supplemented and amended, is hereby transferred and conveyed to the State of Alaska: *Provided, That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife nor facilities utilized in connection therewith, or in connection with general research activities relating to fisheries or wildlife. The State of Alaska shall possess and exercise the same jurisdiction and control over the fisher-*

295.11 (Supp. 1953). Thus, the words "otherwise set apart" cannot have been intended originally to take in lands applied for but not yet withdrawn. Although members of Congress after 1952 might have considered the proviso broad enough to cover lands segregated by a withdrawal application, I have found little evidence in the legislative history that they considered that possibility.¹⁸

ies and the wildlife of Alaska, except fur seals and sea otters, as are possessed and exercised by the several States within their Territorial limits, including adjacent waters. . . ."

This proposed amendment would transfer to the State of Alaska the same jurisdiction and control over the fisheries and wildlife therein as are possessed and exercised by the existing States within their territorial limits and adjacent waters. Authority over matters affecting migratory birds would not be transferred, since this is a subject which is governed by Federal law throughout the Union. Similarly, authority over matters affecting fur seals and sea otters would be expressly excepted from the transfer to the proposed State. Both of these situations involve the discharge of international commitments undertaken by the United States through treaty or convention. Express mention of seal and sea otters is made in the amendment, because the habitat of these animals, unlike that of migratory birds, is largely confined to Alaska.

Under the language of the proposed amendment, the State of Alaska would obtain title to all real and personal property of the United States primarily used in the administration of the Alaska game law and the Alaska commercial fisheries laws. *On the other hand, the United States would retain administrative jurisdiction over the Pribilof Islands, and over all other Federal lands and waters in Alaska which have been set aside as wildlife refuges pursuant to the fur seal and sea otter laws, the migratory bird laws, or other Federal statutes of general application.* The United States would also retain general research facilities relating to fisheries or wildlife. . . .

S. Rep. No. 1929, 81st Cong., 2d Sess. 13-14 (1950) (emphasis added).

¹⁸ The Arctic Wildlife Range and several other proposed refuges were touched on briefly during later consideration of the Statehood Act. *Statehood for Alaska: Hearings on H.R. 50 and Other Bills Before the Sub-*

Reading section 6(e) together with the policy mentioned in section 3, *supra*, I conclude that Congress did not intend the proviso to defeat Alaska's title to submerged lands that were covered only by an application still requiring approval or disapproval by the Secretary.

5. *Executive retention under Submerged Lands Act* § 5(a)

The remaining question is whether the actions of the executive branch alone caused submerged lands to be withheld from Alaska. The answer depends on the Submerged Lands Act, made applicable to Alaska by section 6(m) of the Alaska Statehood Act. *See supra* page 458.

The Submerged Lands Act excepts from the submerged lands granted or confirmed to the states "all lands expressly retained by . . . the United States when the State entered the Union" § 5(a), 43 U.S.C. § 1313(a). The Act does not say "expressly retained by Congress." For present purposes, I assume that an executive withdrawal and reservation of lands, if undertaken with appropriate authority and appropriate intent, can qualify as an express retention.¹⁹ The following sections consider (1) whether an application can also qualify and (2) if so, whether the retention asserted in the present case was authorized.

a. *An application as an executive retention*

The legislative history of section 5(a) is not helpful as to whether an application for withdrawal and reservation

comm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 85th Cong., 1st Sess. 482-84 (1957) (statement of C.R. Gutermuth, Vice President, Wildlife Management Institute); 104 Cong. Rec. 9410-11 (1958) (statement of Rep. Pelly).

¹⁹ This assumption is contrary to Alaska's position. *See* AB 42-44; ARB 8.

should be able to qualify as expressly retaining submerged lands. The language of section 5(a) was adopted as a committee amendment in the Senate, S. Rep. No. 133, 83d Cong., 1st Sess. 16 (1953), and was described as "self-explanatory," *id.* at 20. Debate on the Senate floor was focused on making clear that lands would not be considered expressly retained merely because of federal paramount rights to lands under the territorial sea or because of a general reservation of public lands in any act enabling statehood. 99 Cong. Rec. 2619, 4236 (1953).²⁰ The debate thus

²⁰ The debate contained the following exchange:

Mr. HOLLAND. . . .

I now wish to return to the earlier provision or exception, which relates to "All lands expressly retained by or ceded to the United States when the State entered the Union."

I am not disturbed by the phrase, "ceded to the United States," which I understand applies only in the case of Texas. . . . However, I am concerned with the fact that there have been included in the enabling acts, by which some of the newer States have been created, general reservations of public lands. There are expressions which may go even further than that.

Therefore, I am exceedingly anxious that in the explanation of this amendment it may be made abundantly clear by the Senator from Oregon that mere paramount rights and the existence of such rights to offshore areas and to sea bottoms would not in anywise satisfy this condition of express retention by the United States when the State entered the Union, if that is the fact.

Mr. CORDON. The purpose of the language is to reserve to the United States those facilities and those areas which are used by the Government in its governmental capacity for one or more of its governmental purposes.

The provision specifically saves to the United States that type of facility concerning which there never has been, in the history of this country, a question as to the Federal Government's right of ownership.

The sole purpose of the legislation proposed is to recreate the situ-

did not reach the question of what steps expressly dealing with submerged lands would suffice to retain them.

The Department of the Interior has taken different positions at different times on the effect of an application. In an opinion prepared in August 1959, seven months after statehood, Deputy Solicitor Edmund T. Fritz advised that a pre-statehood application for withdrawal of submerged lands did not prevent their passing to Alaska upon admission. Opinion M-36562 (Ak. Ex. 76). This opinion was overruled by Solicitor Leo Krulitz in 1978. 86 Interior Dec. 151 (1978) (Ak. Ex. 80).²¹

The 1959 opinion dealt with a situation parallel to the present one. In October 1958, notice had been published of an application for an addition to the Aleutian Islands National Wildlife Refuge. 23 Fed. Reg. 8163 (1958) (Ak. Ex. 74). The lands to be added were "all tidelands and all adjoining areas of water extending three miles beyond mean low water, adjacent to" the existing refuge. *Id.* The Secretary did not act on the application before statehood. After statehood, the Deputy Solicitor wrote that the Secretary could no longer grant the application because the lands had passed to Alaska under the Submerged Lands Act. As to the effect of the regulation segregating the lands, the opinion said:

[T]he segregation created by the notation of application 044920 on the record of the Anchorage office, was not equivalent to a Secretarial order withdrawing the lands,

ation in law as it existed in fact before the California, Louisiana, and Texas decisions and not to go beyond that point.

99 Cong. Rec. 2619 (1953).

²¹ In a 1992 supplement to the Krulitz opinion, 100 Interior Dec. 103 (1992), Solicitor Thomas L. Sansonetti did not take a position on the effect of an application. See note 22 *infra*.

although the notation segregated them from various types of disposals under the public land laws to the extent that the requested Secretarial withdrawal would have done if the withdrawal had been made. The segregation was merely to temporarily bar disposals under the public land laws until the Secretary had an opportunity to determine whether the withdrawal should be made or the application therefor denied The segregation did not transfer the areas covered by the application from the administrative jurisdiction of the Bureau of Land Management to that of the Bureau of Sport Fisheries and Wildlife.

Ak. Ex. 76, at 2.

The 1978 Solicitor's opinion, which overruled the 1959 one, dealt with the Arctic National Wildlife Range itself. The Solicitor found it "obvious that the segregative effect of the withdrawal application was, under the regulations in effect at that time, effective against passage of title of submerged lands to the State upon statehood." 86 Interior Dec. 151, 175 (1978). He criticized the 1959 opinion for failing to mention the exceptions made by section 5 of the Submerged Lands Act, and he concluded:

[I]t is plain that a completed withdrawal of lands qualifies as an express retention under the Submerged Lands Act. The Departmental regulations in effect at that time gave an identical effect to an application—it segregated the lands from disposal to the same extent that the withdrawal applied for would, if finally executed, have done. The purpose of the regulation is clear: The filing of an application prevented anything from happening, prior to a decision on the application, which would have rendered a favorable decision on the application impossible. Now the Secretary might well have decided in his discretion to reject a previously-filed application because of statehood, and instead let the State select the submerged lands in-

cluded in the application. But to allow statehood by itself to override the segregative effect of withdrawal applications provided for in the regulations substantially vitiates the meaning of the "expressly retained" proviso in the Submerged Lands Act.

Id. at 176.²²

I cannot agree that the "expressly retained" provision of the Submerged Lands Act gave such broad force to a temporary segregation of lands as the Solicitor concluded. Contrary to the Solicitor's view, to require secretarial action on the application is not to vitiate the provision. The Secretary had more than a year in which to act on the application for the Wildlife Range, from its filing in November 1957 to Alaska's admission in January 1959.

Furthermore, if secretarial action were not required, then submerged lands could be "expressly retained" by any agency that filed an application for them.²³ Yet review of the merits of an application was to follow, not to precede, its filing, 43 C.F.R. §§ 295.12-295.13, 22 Fed. Reg. 6614

²² In a footnote the Solicitor added, "It also substantially vitiates the meaning of § 6(e) of the Statehood Act" 86 Interior Dec. at 176 n.35. I have already rejected this latter argument.

In the 1992 supplemental opinion, 100 Interior Dec. 103, the Solicitor did not take a position on whether a withdrawal application can by itself expressly retain submerged lands. His analysis was limited to the area found to be covered by a previous withdrawal, Public Land Order 82, and he found that Congress had addressed the disposition of that entire area in the Alaska Statehood Act. 100 Interior Dec. at 105, 106 n.18, 108 n.20, 125. For submerged lands covered by both Public Land Order 82 and by the withdrawal application, he found that Congress intended to defeat state title by section 6(e) of the Statehood Act. *Id.* at 138.

²³ Under the regulations, applications might be filed by "the heads of Federal agencies and instrumentalities and of States and the Territory of Alaska and their political subdivisions or any subordinate officer designated by them." 43 C.F.R. § 295.9, 22 Fed. Reg. 6614 (1957).

(1957), and a decision on the application could be made only at the secretarial level. That was so because the Secretary's authority to withdraw and reserve the lands rested on a delegation to him by the President. Exec. Order No. 10,355, 3 C.F.R. 873 (1949-1953), *reprinted as amended in* 43 U.S.C. § 141 note (1988 & Supp. V 1993). By section 3 of the delegation, the Secretary could redelegate his authority only to the Under Secretary and the Assistant Secretaries of the Interior.²⁴

I therefore find that the application for the Arctic Wildlife Range, together with the regulation segregating the lands applied for, did not cause any submerged lands to be "expressly retained by . . . the United States when the State entered the Union."

²⁴ Executive Order No. 10,355 provided in part:

Section 1. (a) Subject to the provisions of subsections (b), (c), and (d) of this section, I hereby delegate to the Secretary of the Interior the authority vested in the President by section 1 of the act of June 25, 1910, ch. 421, 36 Stat. 847, and the authority otherwise vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.

(b) All orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders and shall be submitted to the Division of the Federal Register, General Services Administration, for filing and for publication in the Federal Register.

....
Sec. 2. The Secretary of the Interior is authorized to issue such rules and regulations, and to prescribe such procedures, as he may from time to time deem necessary or desirable for the exercise of the authority delegated to him by this order.

Sec. 3. The Secretary of the Interior is authorized to redelegate the authority delegated to him by this order to one or more of the following-designated officers: the Under Secretary of the Interior and the Assistant Secretaries of the Interior.

b. *Authority for an executive retention*

A further point reinforces the conclusion just reached. I have considerable doubt whether even the Secretary of the Interior was authorized to grant the application for the Wildlife Range, insofar as it applied to any lands under navigable waters, on the terms requested. If this doubt is well-founded, then the mere pendency of the application cannot have withheld submerged lands.

The doubts about the Secretary's authority arise from the following background. Congress has plenary power over federally owned lands in a territory, but it may delegate power to the executive branch. *See supra* section B(1). The United States has suggested two sources of executive authority in this case. One is the Pickett Act, adopted in 1910, which authorized the President to make withdrawals of public lands for public purposes. Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (repealed 1976). The other is the implied authority of the President, recognized by the Court in 1915, on the basis of long continued congressional acquiescence in executive withdrawals. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).²⁵ The President redelegated his authority from both sources to the Secretary of the Interior. Exec. Order No. 10,355, *supra* note 24.²⁶

Thus, the Secretary's authority to grant the application for the Wildlife Range rested ultimately either on the Pickett Act

²⁵ Congress eliminated the President's implied authority in 1976 at the same time that it repealed his Pickett Act authority. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792. Language of the Pickett Act that was not repealed is codified at 43 U.S.C. § 142 (1988).

²⁶ For a critical review of the authorization for withdrawals for the use of the Fish and Wildlife Service, see Charles F. Wheatley, Jr., *Study of Withdrawals and Reservations of Public Domain Lands* 245-57 (U.S. Public Land Law Review Comm'n, 1 Background Studies, 1969 & photo. reprint).

or on the implied authority of the President. The application itself said that the withdrawal should be made under the President's "inherent" (that is, nonstatutory) authority. See *supra* note 1. The published notice of application, *supra* note 2, was silent on the point. The eventual public land order, *supra* note 3, referred simply to "the authority vested in the President."

I believe that both the application and the public land order must be construed to rest on the implied authority of the President, not on the Pickett Act. This is so because both documents closed the lands to mining. The focus of these documents was on the uplands. The original application and the published notice, *supra* notes 1-2, called for mining locations to be precluded until September 1, 1958. Later the date was extended to September 1, 1959; then to September 1, 1960; and finally to September 1, 1961. 23 Fed. Reg. 7592 (1958); 24 *id.* 7143 (1959); 25 *id.* 10,323 (1960). The eventual public land order of December 1960, *supra* note 3, closed the Range to mining entirely.²⁷ The Pickett Act, however, required lands withdrawn to remain open under the mining laws:

Be it enacted . . . That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reserva-

²⁷ In contrast, the order creating the National Petroleum Reserve-Alaska, which I did find to be authorized by the Pickett Act, said that the reservation "shall be for oil and gas only and shall not interfere with the use of the lands or waters within the area indicated for any legal purpose not inconsistent therewith." Exec. Order 3797-A, *supra* section VIII at 343 n.1.

tions shall remain in force until revoked by him or by an Act of Congress.

SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals

36 Stat. 847, as amended by Act of Aug. 24, 1912, ch. 369, 37 Stat. 497.²⁸

The Interior Department's treatment of mining in the Range, moreover, reflected a deliberate policy decision. At the time of the November 1957 application, the Secretary explained:

[W]hile this area will be closed to all forms of land entry which leads to appropriation of the title to the surface, . . . we intend to submit to Congress legislation to authorize metalliferous mining under a permit system. At the present time mining can only be conducted under the existing law which would lead to patent of the surface to the mining claimant who had perfected his claim. If Congress does not enact legislation to permit mining under the permit system, we will have to reconsider the opening of this area to mining activities.

U.S. Ex. 32. The legislation referred to was sent to Congress, after statehood, in the spring of 1959. U.S. Ex. 27 (Ak. Exs. 11, 56). The draft bill gave the Secretary of the Interior specific authorization to establish an Arctic Wildlife Range and to allow mining and mineral leasing on special

²⁸ Section 2 forbade the lands withdrawn to be closed to certain activities under the mining laws. If lands were not already open under the mining laws for those purposes, I do not believe they would be thrown open to exploration, discovery, occupation, or purchase merely by virtue of a Pickett Act withdrawal.

terms. S. 1899, 86th Cong., 1st Sess. (1959), *reprinted in Arctic Wildlife Range—Alaska*, *supra* note 12, at 1. During Senate hearings on the bill, it was brought out that the only reason for seeking the legislation was the desire to allow mining on terms different from those of existing law. *Arctic Wildlife Range—Alaska*, *supra* note 12, at 435 (statement of Theodore Stevens (accompanying Assistant Secretary of the Interior Ross L. Leffler)). The Interior Department was certainly aware of the mining provision of the Pickett Act. *Id.*

It was after Congress failed to enact an Arctic Wildlife Range bill that Secretary Seaton issued Public Land Order 2214. For this action, as for the earlier application, the implied authority of the President was the only suitable basis. As to the uplands, no difficulties with a withdrawal on this basis have been suggested. For Alaskan submerged lands, however, I have already found that implied authority was probably not available. Congress had provided otherwise in the Alaska Right of Way Act, which was inconsistent with an implied executive authority to retain submerged lands beyond Alaska's statehood:

[N]othing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, *it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District.* The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark.

Act of May 14, 1898, ch. 299, § 2, 30 Stat. 409 (codified at

43 U.S.C. § 942-1 (1988)) (emphasis added).²⁹ See *supra* section VIII at 406 n.45, 410-11, 415.

Thus there are severe doubts about the Secretary's authority to grant the application as it stood and insofar as it applied to submerged lands. If well founded, they form a second and independent ground for holding that the application for the Range, together with the regulation segregating the lands applied for, did not expressly retain lands within the meaning of Submerged Lands Act section 5(a).³⁰

6. Conclusion

I find that, for any lands beneath navigable waters that are tidally influenced and that were included within the application for withdrawal and creation of the Arctic Wildlife Range, the application did not effectively withhold the lands from Alaska. I therefore recommend that the Court answer question 9 in favor of Alaska.

C. Question 10: The interpretation of the withdrawal application

The conclusion I have just reached on question 9, if accepted by the Court, makes question 10 moot. The application for the Range did not keep submerged lands from passing to Alaska at statehood. It is therefore unnecessary to

²⁹ The Alaska Right of Way Act has been repealed "insofar as applicable to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System." Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793.

³⁰ Had Public Land Order 2214 been issued before statehood, it might be argued that any unauthorized withdrawal of submerged lands was ratified by Congress in Statehood Act section 6(e). As I have already found, however, section 6(e) did not extend to the application.

decide just what submerged lands, if any, the application covered.

The Court might, of course, disagree as to question 9 and so make question 10 significant after all. With such a possibility in mind, the parties have asked the Master to address all of the questions presented in the joint statement. Joint Statement 21. Accordingly, I proceed to question 10.

As part of the context of the discussion, I shall assume that the Court does reject my recommendation on question 9. This assumption is reflected in the statement of question 10 itself:

Assuming the acreage included in the 1958 application for the Arctic Wildlife Range was effectively withheld from Alaska, does the Range embrace the submerged lands between the mainland and the barrier islands in the area between the Canadian boundary and Brownlow Point?

Joint Statement 20. As explained earlier, question 10 has been broadened since it was written. *See supra* section A. The question now involves two parts. One is the original question: what is the location of the boundary described in the application for the Range? The other is the question raised after *Montana*: does the application include lands under navigable waters that lie inside this boundary?

1. *The location of the boundary*

The notice of application for the Range described the proposed boundary as follows:

Beginning at the Intersection of the International Boundary line between Alaska and Yukon Territory, Canada, with the line of extreme low water of the Arctic Ocean in the vicinity of Monument 1 of said International Boundary line;

Thence westerly along the said line of extreme low water, including all offshore bars, reefs, and islands to a point of land on the Arctic Seacoast known as Brownlow Point

23 Fed. Reg. 364 (1958) (quoted more fully *supra* note 2).³¹

In the United States' view, the boundary described is a single continuous line, running from the Canadian border to Brownlow Point and following the seaward side of offshore bars, reefs, and islands. In Alaska's view, the boundary consists of one line following the sinuosities of the mainland shore, with additional lines around islands and other features that are exposed at extreme low tide.

The geography is shown on a small scale in figure 1.1. The parties' positions are shown, on a somewhat larger scale, in figures 9.1 and 9.2 (facing page 450). At the hearing, witnesses for each side testified to the boundary using National Ocean Service charts on a scale of about 1:50,000, or five times the scale of the maps used in figures 9.1 and 9.2. Joint Exs. e through i. For the United States, testimony on the boundary was given by Dr. Robert Smith, a geographer at the Department of State. Tr. 20-24, 123-24, 180-93. Dr. Smith's interpretation of the boundary is shown on the joint exhibits in blue.³² For Alaska, testimony was given by Mr. Claud Hoffman, a professional surveyor and

³¹ The same language appeared in the post-statehood public land order establishing the Range. Public Land Order 2214, 25 Fed. Reg. 12,598 (1960) (quoted in part *supra* note 3).

³² In addition to the NOS charts forming the joint exhibits, the United States' position is also shown in detail in two other sets of exhibits. The several versions are all similar but not identical.

One version is U.S. Exhibit 58. It comprises eleven sheets of Geological Survey maps, covering the same area as the NOS charts and also on a large scale (1:63,360). The maps in exhibit 58 are titled "Arctic National Wildlife Range Coastal Boundary"; are dated October 2, 1978; and are identified in the exhibit list as giving the official position of the Depart-

Director of Technical Services for the Alaska Department of Natural Resources. Tr. 135, 149-51, 156-59, 169-79. Mr. Hoffman's interpretation appears on the same exhibits in red.

The lands that are treated differently by the parties' interpretations are of two main kinds. One is land lying between offshore formations and the mainland, often in the form of long narrow lagoons.³³ These lands are inside the Range boundary on the United States' interpretation, outside it on Alaska's. For example, near the eastern end of the Range as shown in figure 9.2, the United States' version of the boundary extends from Demarcation Point to Icy Reef, thus enclosing Demarcation Bay and Pingokraluk and Siku Lagoons. Alaska's version follows the mainland around the inside of Demarcation Bay and the lagoons and separately encloses Icy Reef.

Second are the mouths of rivers on the mainland. For example, there are no offshore formations where the Katakaturuk River empties into Camden Bay, and the parties therefore agree that the boundary there lies on the mainland. Joint Ex. h; fig. 9.1. The United States would draw the boundary across the mouth of the river. Alaska would follow the low-water line upriver for some distance before

ment of the Interior. 1 Transcript vi. Perhaps inadvertently, these maps were not specifically referred to at the hearing or elsewhere in the record.

U.S. Exhibits 46 and 47, like U.S. Exhibit 58, issue from the Department of the Interior. These are a small-scale map of the Range and several large-scale detail maps, all dated June 1971. Mr. Walt McAllester, chief of the Division of Realty of the Fish and Wildlife Service, identified exhibits 46 and 47 as the current maps from an atlas or "status book" showing every Fish and Wildlife Service installation. Tr. 46, 63-65. The United States has referred to exhibits 46 and 47 as "the best evidence of the Department of the Interior's interpretation of the boundary location." USB 17.

³³ Photographs of some of the lagoons are in evidence as United States Exhibits 56 and 57. Tr. 83-84.

crossing. On Alaska's approach, any islands in the river mouth are treated like barrier islands offshore, and the lower part of the river, like the lagoons, is excluded from the Range. Similarly Alaska would exclude from the Range the lower parts of the Hulahula, Okpilak, Jago, and Aichilik Rivers, among others. Joint Exs. g, f; figs. 9.1 (Hulahula River), 9.2 (other rivers). This approach is essentially the same that Alaska took in question 11, which affected the boundary of the National Petroleum Reserve-Alaska at the mouths of rivers. *See supra* section VIII(C)(4)(c).

a. The boundary description on its face

In reaching their different interpretations, the parties emphasize different elements of the boundary description. Alaska focuses on the phrase "line of extreme low water"; it objects that the United States' interpretation includes water crossings departing from that line.

The United States replies that the phrase is not simply "line of extreme low water" but "the line of extreme low water of the Arctic Ocean . . . including all offshore bars, reefs, and islands . . ." *See supra* pages 478-79. It points to testimony that the Arctic Ocean begins on the seaward side of barrier formations, not at the low-water line of the lagoons or at the banks of rivers. Tr. 25-26, 120-21; Joint Ex. e.

As to the phrase about offshore formations, the United States points out that bars and reefs are to be included inside the boundary even if they are permanently submerged and so lack a low-water line. Both sides agreed that such formations are possible. Tr. 17-18, 38, 208 (Smith); Tr. 152, 277 (Hoffman). Although the testimony was not entirely clear, there was a suggestion that submerged bars do exist inside of Demarcation Bay. Tr. 18, 32-33, 38-39; Joint Ex. e.

Alaska responds to the United States' points with an

asserted rule of construction: that "descriptions by metes and bounds . . . control general descriptive language in a boundary description if there is a conflict." ARB 16, citing *Prentice v. Northern Pacific Railroad*, 154 U.S. 163 (1894). Alaska then characterizes "line of extreme low water" as a metes-and-bounds description and relegates the rest to the category of general descriptive language.

I cannot agree with Alaska that all words except "line of extreme low water" should be ignored. As I have found in connection with the boundary of the National Petroleum Reserve-Alaska, the objective must be to ascertain the intent of the boundary description, and the *Prentice* case is not to the contrary. Section VIII, *supra*, at 370. In any event, the rule Alaska states does not support its conclusion. Whatever distinction one might make between a metes-and-bounds description and a more general description, surely the entire phrase "the said line of extreme low water" is part of the former. But the question, in part, is what this phrase means. Does the word "line," used in the singular, imply that the boundary is a single line? Does the word "said," referring back to the previous paragraph, incorporate into the description the qualifying phrase "of the Arctic Ocean"? If so, did the drafters think that "Arctic Ocean" included the lagoons? To resolve such questions about the meaning of the description, it becomes appropriate to consider other evidence of what was intended.

b. Other evidence of the intended boundary

The United States argues that its interpretation of the boundary language is supported by the consistent interpretation of the Department of the Interior and by the purposes of the Range. Alaska objects that much of the United States' evidence is irrelevant because it dates from times later than Alaska's admission to the Union in January 1959. See Tr. 80-82. I do not deal with Alaska's objection because I be-

lieve that the evidence up to January 1959 is sufficient to resolve the question of the boundary location.

(1) Prestatehood maps

The single clearest item of evidence comes from an April 1958 report of the Interior Department on the application for the Range. U.S. Ex. 24; Ak. Ex. 20. This report, made by the Bureau of Land Management, stated, "The description of the proposed area has not been altered since it was first proposed, and is sufficiently clear so that it may be plotted on maps commonly available." *Id.* at 2. The last page of the report was a map, which showed the northern boundary as a smooth line seaward of barrier features. See Tr. 57-58, 61-62, 118-19.

Another prestatehood map is of similar import. This second map was attached to a press release issued by the Secretary of the Interior in November 1957, announcing that the application for creation of the Range had been filed. U.S. Ex. 12; Ak. Ex. 57. These are the only prestatehood maps in evidence that purport to show the boundary of the proposed Range.³⁴

³⁴ Alaska correctly points out that the maps show only the exterior boundary for the Range; they do not establish whether all submerged lands inside the boundary were to be withdrawn or whether there were other exceptions to the withdrawal. The exterior boundary, however, is the only question being considered in this section.

One other prestatehood exhibit might be thought, incorrectly, to show a boundary for the Range. U.S. Ex. 61; Tr. 43-44. The exhibit consists of excerpts from a July 1958 document issued by the Bureau of Land Management and titled "Alaska: Federal Land Withdrawals and Reservations." Panels 8 and 1B of the exhibit show a withdrawal along the Arctic coast in the Range area. However, the area depicted is not the Wildlife Range (for which there was only an application in July 1958) but a much earlier withdrawal. Public Land Order 82, *supra* note 7. This interpretation is supported by the legend included with the exhibit, the southern boundary that is shown, and the failure to show a western boundary near

(2) *Development of the boundary description*

Besides the maps of the proposed Range, the record includes several drafts of the boundary description. In the earliest, dated September 16, 1957, the proposed northern boundary is described simply as running "west along the Arctic Coastline." U.S. Ex. 2.³⁵ In the second, which has a cover memo dated October 22, 1957, the "Arctic Coastline" is changed to the "mean high tide level of Beaufort Sea." U.S. Ex. 7; Ak. Exs. 45, 70.³⁶ Thus, a tidal datum is specified for the first time. In the third version, handwritten changes have been made in the October 22 description, bringing it to its final form. U.S. Ex. 8; Ak. Ex. 69.³⁷ The "mean high tide level of Beaufort Sea" has now become the

Brownlow Point. The interpretation also accords with that of the Solicitor of the Interior. 86 Interior Dec. 151, 162 (1978), *modified and supplemented in other respects*, 100 Interior Dec. 103 (1992).

³⁵ The September 16 description starts at the northwest corner of the Range, goes south and east to the boundary with Canada, and concludes:

thence north along the International Boundary to the Arctic Ocean;
thence west along the Arctic Coastline to its intersection with the Canning River, at the point of beginning.

U.S. Ex. 2. This description, according to the signature line, was written by John I. Buckley of the Fish and Wildlife Service.

³⁶ More fully, in the October 22 version the boundary goes north

following the said International Boundary for approximately one hundred (100) statute miles to the Arctic Seacoast at the level of mean high tide . . . ;

thence in a generally westerly direction along the said mean high tide level of Beaufort Sea to the point of beginning.

U.S. Ex. 7; Ak. Exs. 45, 70. By the October 22 memorandum, the description was sent by Clarence J. Rhode, regional director of the Bureau of Sport Fisheries and Wildlife in Juneau, to the director of the bureau in Washington.

³⁷ These final changes were made in the Washington office of the Fish and Wildlife Service by Mr. F.G. Spoden, the Assistant Chief of the Division of Realty. Tr. 49-50.

"said line of extreme low water, including all offshore bars, reefs, and islands." *See supra* page 479. That is, the tidal datum is changed from high water to low water, and offshore formations are mentioned for the first time.

This sequence of descriptions strongly suggests, as the United States contends, that "the said line of extreme low water" in the final description does mean "the line of extreme low water of the Arctic Ocean." It also suggests, compatibly with the maps, that the drafters contemplated a single line and added the words "including all offshore bars, reefs, and islands" to make clear whether that line lay along the mainland or outside the barrier formations.

Alaska contends that the development of the description shows a significant concern with whether tidelands were to be part of the Range and, by implication, an absence of interest in the submerged lands of the lagoons. On the interpretation suggested by the maps, however, the implication does not follow. The change from mean high tide to extreme low water would have its effect on the seaward side of any barrier formations. The lagoons and any tidelands facing on lagoons are landward of the barriers and would be inside the boundary in either case.

(3) *The purposes of the Range*

Alaska argues that the purposes of the Wildlife Range, as they were understood prior to statehood, did not call for the inclusion of submerged lands inside the boundary. It brings to bear two main items of documentation.

The first is a letter of October 15, 1957, written by Clarence J. Rhode. U.S. Ex. 5. Mr. Rhode, a biologist, was the Regional Director for Alaska of the Bureau of Sport Fisheries and Wildlife, and he was the person responsible for the draft boundary description of October 22, 1957. Alaska points to testimony that Mr. Rhode was in the best position to determine what lands were needed to preserve the re-

sources of the proposed Range. Tr. 102. The October 15 letter was addressed to Olaus J. Murie, director of the Wilderness Society and the principal conservationist behind the Arctic Wildlife Range. In it, Mr. Rhode said:

Ted Stevens recently visited us and I get the impression they [the Interior Department] are getting ready to move on this matter [presumably, the Arctic Wildlife Range]

....

We are presently compiling a list of other small areas which should be set aside for wildlife before Statehood. The tidelands bills would jeopardize waterfowl areas everywhere even though they may now be considered with a National Forest or even a Wildlife Range such as the Kenai. The solution appears to be withdrawal action including the tidelands.

U.S. Ex. 5.

Alaska reasons that, although this letter speaks of tidelands, it nowhere speaks of withdrawing lands below the low-water line. The United States, which also relies on the letter, reads it to the contrary as referring to water areas generally.

The United States' reading appears to be correct. Although the letter uses the word "tidelands," it cannot have used it in the technical sense of land "covered and uncovered by the daily rise and fall of the tide." 1 Aaron L. Shalowitz, *Shore and Sea Boundaries* 318 (U.S. Dep't of Commerce Pub. 10-1, 1962). That is shown by its reference to the Submerged Lands Act (passed in 1953) as the "tidelands bills." This use of "tidelands" to include permanently submerged lands was common at the time. See, e.g., 99 Cong. Rec., pt. 13, at 583, 601-02 (1953) (indexing all references to submerged lands under "tidelands").

The second document to which Alaska refers is a statement of justification for the Range, dated November 7, 1957.

U.S. Ex. 9; Ak. Ex. 16. The justification is in the form of a memorandum from D.H. Janzen, director of the Bureau of Sport Fisheries and Wildlife, to the Bureau of Land Management; it was made part of the application for the Range, *supra* note 1, that was later submitted on November 18. The justification said in part:

The outdoor recreation activities of Alaska's visitors and residents bring to the Territory an income that is out-ranked only by commercial fishing and mining. The enormous development of the outdoor recreation industry and the growing willingness of vacationists to spend their ever-increasing vacation time on long trips to scenic wild areas strongly indicate that in the future Alaska's outdoor recreation resources may contribute more revenue than any other industry in the Territory. The wildlife and the wilderness frontiers of Alaska are the basic resources upon which the recreation industry is dependent.

....

The portion of the Arctic plain included in the proposal is a major habitat, particularly in summer, for the great herds of Arctic caribou, and the countless lakes, ponds, and marshes found here are nesting grounds for large numbers of migratory waterfowl that spend about half of each year in the United States. Thus the production here is important to a great many sportsmen. The river bottoms with their willow thickets furnish habitat for moose. This section of the seacoast provides habitat for polar bears, Arctic foxes, seals, and whales.

The Arctic caribou herds use all of the Brooks Range in summer and the south side particularly in winter. The Dall sheep are year-round residents and, like the caribou, occur in greater total numbers here than in other parts of Alaska. Moose and grizzlies are common. Wolverines are seen occasionally. Ptarmigan are numerous. The

south slope of the Brooks Range meets the year-round requirements for all of the native wildlife.

....
For the wilderness explorer, whether primarily fisherman, hunter, photographer, or mountain climber, certain portions of the Arctic coast (if and when access is permitted by the military) and the north slope river valleys, such as the Canning, Hulahula, Okpi^{1/2}, Aichilik, Kongakut, and Firth, and their great background of lofty [lofty?] mountains, offer a wilderness experience not duplicated elsewhere in our country.

This unmodified region is important for game management research, particularly on caribou range problems. This spacious, unaltered habitat would permit the reintroduction of the musk ox.

Looking ahead 50 years at the unfolding story of Alaska's development, it is clear that the only economically feasible opportunity for maintain[ing] a wilderness frontier large enough for the preservation of the caribou, the grizzly, the Dall sheep, the wolverine, and the polar bear, all of which require a sizeable unrestricted range, lies in this northeastern Arctic region of the Territory.

The proposed Arctic Wildlife Range offers an ideal opportunity, and the only one in Alaska, to preserve an undisturbed portion of the Arctic large enough to be biologically self-sufficient. It would comprise one of the most magnificent wildlife and wilderness areas in North America, being exceeded in extent only by Canada's Wood Buffalo Scientific Study Area, which is farther south and represents a different habitat.

U.S. Ex. 9; Ak. Ex. 16.

In Alaska's view, this statement shows that little or no importance was attached to the lagoons at the time the proposal for the Range was being prepared. Alaska argues fur-

ther that whatever importance may have been attached to them deserves little weight because it was ill-informed.

I cannot agree with Alaska's assessment. There was considerable testimony on the meaning of the second paragraph quoted above. Tr. 102-04. Alaska brought out that, although the lagoons are not part of the "Arctic plain" nor of the "lakes, ponds, and marshes," they are part of "[t]his section of the seacoast." *Id.* Thus both the lagoons and the disputed riverbeds are covered in this paragraph of the justification:

The river bottoms with their willow thickets furnish habitat for moose. This section of the seacoast provides habitat for polar bears, Arctic foxes, seals, and whales.

Furthermore, there was undisputed evidence that polar bears use the lagoon areas for feeding and that seals have been seen in both lagoons and rivers. Tr. 90-92.

Alaska objects that "seacoast" is inappropriately broad, covering not only lagoons and barrier islands but also areas farther offshore that are plainly outside the Range boundary. See Tr. 104. It objects also that whales apparently use only the parts of the seacoast outside the lagoons; that it is questionable whether polar bears make their dens in the lagoons; and that other creatures not mentioned do use the lagoons, especially caribou and waterfowl. See Tr. 87-89, 90-92, 108-11.

The objections are not well taken. The present question is where the drafters of the boundary description for the Range intended to place the seaward boundary. The reference to aquatic animals in connection with the seacoast shows that they must have intended the boundary to take in submerged lands. That they had imperfect knowledge of what animals used the lagoons and in what ways is irrelevant. For instance, there is no significance in the failure to mention caribou as using the lagoons, for the justification shows (in the

fifth paragraph quoted) that research on the caribou was one of the original purposes.

The justification also makes clear that the purposes of the Range included preserving recreational values as well as preserving wildlife. The fourth paragraph quoted speaks of the "wilderness explorer," who might be "primarily fisherman," and in the same sentence it mentions both the Arctic coast and the north slope river valleys. If these areas were to serve the fisherman, one must suppose that some submerged lands were included inside the boundary.

Alaska says that the lagoons did not receive explicit mention in documents concerning the Range until the early 1970s and that earlier documents tended to speak of the coastal plain, not the coast, as the northernmost region of the Range. It is certainly true that the later materials give the lagoons great emphasis, but that does not undo the indirect reference to them as "this section of the seacoast" in the 1957 justification. Nor can one put much reliance on the failure of other early documents to mention the seacoast as a distinct region of the Range. For example, one of the documents cited is the Bureau of Land Management's report of April 1958, which states: "The northernmost portion consists of Arctic plain, a level, windy tundra-covered area with varying degrees of drainage." U.S. Ex. 24 (Ak. Ex. 20) at 2. But this same report, as already discussed, included a map showing the lagoons inside the boundary. *See supra* page 483. The description quoted is also inapplicable to the barrier islands, which are clearly inside the boundary. Tr. 105-06, 118.

I conclude that the purposes of the Range, as understood prior to Alaska's statehood, give support to a finding that the lagoons and the mouths of rivers were intended to be inside the boundary.

(4) *Comparison with other descriptions*

The prestatehood evidence about the proposed Wildlife Range—including maps, drafts of the boundary description, and intended purposes—together give strong support to the United States' interpretation of the boundary as a continuous line along the outside of barrier reefs and islands. Alaska contests the interpretation on the further basis of comparison with other boundary descriptions.

One type of comparison is with the description of other wildlife refuges in Alaska. As the State points out, there was testimony that the Fish and Wildlife Service in Washington regularly reviewed, and often modified, the boundary descriptions received from its regional offices. Tr. 49-50, 68-70. One should therefore expect reasonable consistency in the style of description across different refuges.

First, Alaska mentions the Simeonof National Wildlife Refuge, which was created by public land order in November 1958. Public Land Order 1749, 23 Fed. Reg. 8623 (1958) (Ak. Ex. 73). The description of the Simeonof refuge said:

Subject to valid existing rights, the following-described public lands, tidelands, and adjacent waters in Alaska are hereby withdrawn . . . as a refuge for the preservation and propagation of the sea otter and other wildlife thereon . . . :

All of Simeonof Island and its tidelands which are located in the Shumagin Group at approximate latitude 54°53' N., longitude 159°15' W., together with all adjacent areas of water extending one mile beyond mean low water, and including any islands within said one mile area.

The area described contains approximately 10,442 acres of land and water.

Id. The second description was of a proposed addition to an

existing refuge, the Aleutian Islands National Wildlife Refuge. The application for withdrawal, published in October 1958 and slightly amended in November, said:

The applicant desires the land for an addition to the Aleutian Islands National Wildlife Refuge for protection of and to facilitate the management of the sea otter inhabiting the coastal waters.

....

The lands involved in the application are:

All tidelands and all adjoining areas of water extending three miles from mean high tide, adjacent to the Aleutian Islands National Wildlife Refuge as established by Executive Order 1733 of March 3, 1913, and modified by subsequent orders.

23 Fed. Reg. 8163 (1958) (Ak. Ex. 74); 23 *id.* 9039.³⁸

Alaska suggests that these two descriptions very clearly took in submerged lands, and it infers that the description of the Arctic Wildlife Range, being less clear, did not include them. Although the argument is plausible, I find two difficulties with it. First, the boundary in both the Simeonof and Aleutian Islands descriptions lies entirely at sea, one outside a one-mile belt of water and the other outside a three-mile belt. In contrast, much of the seaward boundary of the Arctic range lies along the outer shore of the barrier islands. It is thus at least possible, as the United States suggests, that waters landward of the barriers were assumed to be inside the boundary of the Arctic range. No corresponding assumption was possible for the Simeonof and Aleutian ranges.

Second, the Simeonof and Aleutian descriptions were not

³⁸ This application was the subject of a Solicitor's opinion in August 1959, holding that the lands applied for passed to Alaska at statehood. See *supra* pages 469-70. Apparently no further action was taken on the application after the Solicitor's opinion.

the only ones in which the Interior Department made the treatment of submerged lands clear. Other descriptions clearly excluded them. For example, the lands in the Kuskokwim National Wildlife Refuge were described in part as follows:

Beginning on the shore of Bering Sea at the line of mean high tide and at the south side of the entrance to Hooper Bay . . . ; . . . ; thence northwesterly with the line of mean high tide of Bering Sea 50 miles to the place of beginning, containing approximately 1,870 square miles of lands and waters, *but excluding lands beneath navigable waters as defined in section 2 of the Submerged Lands Act of 1953* (67 Stat. 29; 43 U.S.C. 1301).

Public Land Order 2213, 25 Fed. Reg. 12,597, 12,598 (1960) (emphasis added). The description of the Izembek National Wildlife Range used the same exclusionary language. Public Land Order 2216, 25 Fed. Reg. 12,599, 12,600 (1960). Both these ranges were created on December 6, 1960, the same day as the Arctic National Wildlife Range.³⁹

The Arctic range fits neither the inclusive pattern of the Simeonof and Aleutian Island descriptions nor the exclusive pattern of the Kuskokwim and Izembek descriptions. I conclude that no inference about the intent of the Arctic range description can be drawn.

Finally, Alaska compares the boundary description of the Arctic National Wildlife Range with the state boundary descriptions considered in *United States v. Louisiana*, 363 U.S. 1 (1960). The question there was the extent of the grants made by the Submerged Lands Act to the Gulf States, which in turn depended on each state's "boundaries in the Gulf of

³⁹ For the Arctic range, compare Public Land Order 2214, 25 Fed. Reg. 12,598 and *supra* note 3.

Mexico . . . as they existed at the time such State became a member of the Union." Submerged Lands Act § 2(b), 43 U.S.C. § 1301(b). Louisiana's boundary, as specified in its act of admission, went

to the gulf of Mexico; thence, bounded by the said gulf, to the place of beginning, including all islands within three leagues of the coast

363 U.S. at 66, quoting 2 Stat. 701, 702 (1812). The State argued that this language gave it a boundary three leagues at sea. The Court, however, found that the boundary followed the mainland shore:

The boundary line is drawn . . . "to the gulf of Mexico," not *into* it for any distance. The State is thence to be bounded "*by the said gulf*," not by a line located three leagues out in the Gulf, "to the place of beginning," which is described as "*at the mouth of the river Sabine*," not somewhere beyond the mouth in the Gulf. (Emphasis added.) And while "all islands" within three leagues of the coast were to be included, there is no suggestion that all waters within three leagues were to be embraced as well. In short, the language of the Act evidently contemplated no territorial sea whatever.

363 U.S. at 67-68. The Court reached similar results for Mississippi and Alabama, both of which had boundaries "including all islands within six leagues of the shore." *Id.* at 79-82.

Alaska suggests that the boundary language for the Wildlife Range is remarkably similar. There is, however, an important difference between "including all islands within three leagues of the coast" and "including all offshore bars, reefs, and islands." The latter description contains no basis for claiming lands seaward of any barrier formations, and the United States has not claimed any belt of open water. Un-

like Louisiana's construction of the "three league" language, the United States' construction of the Wildlife Range boundary would not take in "waters and submerged lands which bear no proximate relation to any islands, and which would otherwise be part of the high seas." 363 U.S. at 70.⁴⁰

I conclude that the *Louisiana* case, like the descriptions of other wildlife refuges, is not contrary to the judgment I have reached from the evidence specific to the Arctic National Wildlife Range. I therefore find, in accordance with the United States' contention, that the boundary of the Range between the Canadian border and Brownlow Point is a single continuous line, following the seaward side of offshore bars, reefs, and islands and, where it meets rivers, crossing such rivers at their mouths.

2. Rights to submerged lands inside the boundary

Although lands under navigable waters lie inside the boundary of the Range, the ownership of these lands depends on more than the boundary location. According to the Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981), and *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), it is strongly presumed that lands under inland navigable waters passed to Alaska at statehood.

Some of the lands that I have found to be inside the

⁴⁰ The Wildlife Range also differs from the *Louisiana* situation with respect to submerged lands shoreward of barrier islands. For the Wildlife Range, the whole dispute concerns these lagoons and other near-shore features. In *Louisiana*, the status of the corresponding areas was conceded by the United States: they were the property of Louisiana, Alabama, and Mississippi as lands under inland waters, independently of either the Submerged Lands Act or of the state boundary location. 363 U.S. at 67 n.108; *id.* at 98 (Black, J.); *id.* at 118 (Douglas, J.). Thus the areas disputed between the United States and the Gulf States there and the United States and Alaska here have no corresponding parts in common.

boundary are subject to this presumption. They include tidelands, the tidally influenced parts of rivers, and any areas inside the boundary forming juridical bays. *See supra* note 13.

For the United States to retain these lands under inland waters beyond Alaska's statehood, *Montana* and *Utah* require strong evidence of intent to make the lands part of the federal reservation and require a significant purpose, such as a "public exigency," in support of the intent. *See supra* section VIII(E)(4)(a). *Utah* requires, in addition, a showing of affirmative intent to defeat the State's title to the lands. *See supra* section VIII(E)(5).

Most of the evidence of the intent behind the application has been reviewed in the previous section. Especially relevant here is the statement of justification for the Range, which referred to the seacoast as providing habitat for polar bears, seals, and whales. The drafters cannot have thought this habitat was only upland. The justification also refers to the river bottoms as furnishing habitat for moose, and it mentions the interests of fishermen. All these elements point to an intent to make submerged lands part of the Range, not simply to place them inside the external boundary. In addition, there is the fact that the drafters deliberately changed the seaward boundary, moving it from mean high tide to extreme low water so as to take in the tidelands. A witness for the United States testified that such changes were often made in order to protect significant resources in the intertidal zone. Tr. 69. There would have been no point in moving the boundary in this way unless the tidelands were themselves to be reserved.

It is also clear that the reservation was meant to have permanent effect. The application for the Range was developed with conscious reference to Alaska's impending statehood. This is illustrated in Mr. Rhode's letter to the Wilderness Society, mentioning areas that should be set aside for wildlife before statehood. U.S. Ex. 5, *supra* pages 485-86. Thus

the Interior Department certainly intended to defeat Alaska's title to whatever submerged lands were made part of the Range, not merely to hold them until Alaska's admission to the Union.⁴¹

Alaska's remaining arguments are directed to whether there was a need for the United States to retain submerged lands as part of the Range. One argument is, in effect, that submerged lands were not subject to disposition under the public land laws and so that their withdrawal was unnecessary. The point is unpersuasive. The application sought not only a withdrawal of lands but also a positive reservation for the use of the Bureau of Sport Fisheries and Wildlife.⁴²

Next Alaska suggests that, assuming submerged lands were believed to be important to wildlife, the United States needed to retain not full ownership but at most the surface rights required for wildlife management. In a related point, Alaska suggests that even the retention of surface rights was unnecessary because, even without them, the United States

⁴¹ Alaska has argued that the *Utah* requirement of intent to defeat state title can be satisfied only by the intent of Congress itself. I noted this point but left it open in the discussion of the National Petroleum Reserve-Alaska. Section VIII, *supra*, at 431 n.72.

For the Wildlife Range, the appropriate analysis depends on the Court's theory in answering question 9. If the Court found that the application was effective as to submerged lands because there was a congressional retention, then Congress itself must have adopted an intention to defeat state title. If the Court found that the application was effective as to submerged lands because there was an executive retention, then this must imply that the executive had the power needed to determine what submerged lands it wanted to retain.

⁴² Compare section VIII, *supra*, at 407-09, 421-22, 427 (discussing the meaning of "public lands," the applicability of the public land laws to submerged lands in Alaska, and the need for a reservation to make such land available for public purposes of a specific agency of the United States). On the terms "withdrawal" and "reservation," *see supra* page 395 n.40.

could control the use of submerged lands in order to "prevent adverse impacts on federal uplands." ASRB 21.⁴³

The second argument does not go far enough, for there might be need to "prevent adverse impacts" on the submerged lands themselves, not just on the adjacent uplands. As for the first argument, I have rejected a similar position regarding the National Petroleum Reserve-Alaska. Section VIII(E)(6), *supra*. As noted in that discussion, the Submerged Lands Act treats lands and their natural resources together. The Act defines natural resources to include not only minerals but also marine animal and plant life. § 2(e), 43 U.S.C. § 1301(e). The rights transferred (or excepted from transfer) include both ownership of the lands and natural resources and "the right and power to manage, administer, lease, develop, and use" them. § 3(a), 43 U.S.C. § 1311(a). Thus, according to the Submerged Lands Act, the rights needed for wildlife management are not to be separated from the ownership of the lands, including ownership of the oil and gas rights. As noted in the National Petroleum Reserve

⁴³ In support of this point, Alaska cites *Minnesota ex rel. Alexander v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *United States v. Brown*, 552 F.2d 817 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977).

Both cases rely on the Property Clause of the Constitution, Art. IV, § 3, cl. 2, as the source of federal power. The *Brown* case upheld a federal conviction for duck hunting on a state-owned lake inside the boundaries of a national park, in violation of a National Park Service regulation. The court stated: "[W]e view the congressional power over federal lands to include the authority to regulate activities on non-federal public waters in order to protect wildlife and visitors on the lands." 552 F.2d at 822. In the *Minnesota* case, a federal statute prohibited the use of motorboats and snowmobiles on certain state-owned lands and waters within the boundaries of a federal wilderness area. The court upheld the statute, as against Minnesota's constitutional challenge, and said: "Congress' power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands." 660 F.2d at 1249.

discussion, this result is also consistent with the Court's decision in *Utah*. Section VIII(E)(6), *supra*, at 444-45.

3. Conclusion

The premise of question 10 is that question 9 has been answered in favor of the United States. Both questions have called for consideration of the Court's decisions in *Montana* and *Utah*, in particular of the requirement that some "international duty or public exigency" exist to justify the withholding of submerged lands from the State. In recommending that question 9 be decided in favor of Alaska, I found it significant that the application for the Range might have been denied after statehood and that a denial would have implied the absence of a public exigency.

The discussion of question 10 has assumed that I was mistaken on question 9. Question 10 asks what lands under tidally influenced waters (if any) were included in the application for the Range. I found first (in section C(1)) that the disputed lands—including lagoons, tidelands, and the tidal parts of rivers—are inside the boundary of the Range. I then considered (in section C(2)) whether these lands were made part of the Range. Finding that the necessary intent was present, I turned to additional points that were argued regarding the existence of an exigency. I now find that these additional points, which are distinct from the point considered in question 9, should be decided in favor of the United States.

Accordingly, I conclude that, if the acreage included in the application was effectively withheld from Alaska, the Range does embrace the disputed lands. I therefore recommend that, if the Court finds for the United States on question 9, it should find for the United States on question 10 as well.

PART THREE SUMMARY

X
SUMMARY OF RECOMMENDATIONS

In summary, I recommend that the questions presented in the Joint Statement and its supplements (appendix A) be answered as follows:

Alaska's Counterclaim

Question 1. Alaska's Motion for Leave to File Counterclaim should be granted. Section I(C).

Alaska's Coastline

Questions 2, 3, 4, 12, and 13. The questions concern the basis for determining the extent of Alaska's submerged lands where barrier islands lie offshore between Icy Cape and the Canadian border. All the questions should be answered in the negative, that is, in favor of the United States. Alaska's submerged lands should be measured as a three-mile belt from its coastline, which should follow the baseline as determined under the Convention on the Territorial Sea and the Contiguous Zone without use of the straight baseline provisions of Article 4. The extent of Alaska's submerged lands should not be determined on the basis of straight baselines (questions 2 and 12); it should not be determined on the basis that waters between the mainland and the barrier islands are inland waters (questions 3 and 13); and it should not be determined on the basis that some submerged lands inside the barrier islands, although more than three miles from any upland, lie within Alaska's most seaward contiguous boundary (question 4). Section III(G).

Question 15. The southern portion of Harrison Bay, as shown on NOS chart 16064, is a juridical bay as contended by Alaska. Its closing line should be that agreed on by the parties. Section IV(E).

Question 5. Dinkum Sands is not an island constituting

part of Alaska's coastline under the Submerged Lands Act. Section V(J).

Question 6. The extension of the ARCO pier constructed in 1976 is part of the mainland for the purposes of the Submerged Lands Act. Section VI(D).

Question 14. The features referred to by question 14 should not be deemed low-tide elevations. Twelve other features, whose existence as low-tide elevations has been stipulated (appendix E), may be used in measuring Alaska's submerged lands. Section VII.

Federal Reservations

The National Petroleum Reserve-Alaska

Question 7. Harrison Bay and Smith Bay are not part of the National Petroleum Reserve-Alaska. Section VIII(A).

Question 8. Peard Bay is part of the National Petroleum Reserve-Alaska. Sections VIII(B)(3), VIII(F).

Question 11. Wainwright Inlet, the Kuk River, and Kugrua Bay and River are within the boundary of the National Petroleum Reserve-Alaska. Other small inlets, bays, and river estuaries between Icy Cape and Point Barrow and between Point Tangent and the Colville River are within the boundary of the National Petroleum Reserve-Alaska to the extent that they constitute either small lagoons with barrier reefs less than three miles offshore, in the sense of the discussion in section VIII(C)(4)(b), or rivers. Section VIII(C)(5). Furthermore, the lands under tidally influenced waters within the boundary of the Reserve are part of the National Petroleum Reserve-Alaska. Section VIII(F).

The Arctic National Wildlife Refuge

Question 9. The application for withdrawal and creation of the Arctic Wildlife Range did not effectively withhold offshore submerged lands from Alaska. Section IX(B)(6).

Question 10. If my recommendation on question 9 is found to be incorrect and the application was effective to withhold submerged lands from Alaska, then the Arctic National Wildlife Refuge does embrace the submerged lands between the mainland and the barrier islands from the Canadian boundary to Brownlow Point. Section IX(C)(3).

I recommend that the United States and Alaska be directed to draft a decree consistent with the foregoing recommendations.

The decree should provide that the parties bear their own costs. The expenses and compensation of the Special Master should be borne half by the United States and half by Alaska. As contemplated by the Orders of January 10, 1984 (appendix C) and June 3, 1986 (appendix D), the decree should also recognize the intervenors' obligation for their due share of the Special Master's expenses and compensation and should recognize the United States' and Alaska's rights to seek reimbursement from the intervenors to that extent.

The decree should provide that the Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be deemed necessary or advisable to effectuate and supplement the decree and the rights of the respective parties.

Respectfully submitted,

J. KEITH MANN
Special Master

Stanford, California
March 1996

APPENDICES

APPENDIX A
TEXT OF QUESTIONS PRESENTED

**Joint Statement of Questions Presented and Contentions
of the Parties (May 1980)**

Question 1: Should Alaska's Motion for Leave to File its Counterclaim be granted?

Question 2: Should the extent of Alaska's submerged lands in the leased area be determined on the basis of "straight baselines"?

Question 3: Do the submerged lands between the mainland and the barrier islands in the leased area (including areas more than three miles from any upland) belong to Alaska on the ground that they underlie inland waters?

Question 4: If they do not underlie inland waters of Alaska, do the submerged lands between the mainland and the barrier islands in the leased area which are more than three miles from any upland, but are totally surrounded by submerged lands owned by Alaska, belong to Alaska on the ground that they lie within Alaska's most seaward contiguous boundary?

Question 5: Is the formation known as Dinkum Sands an island constituting part of Alaska's coast line for purposes of delimiting Alaska's offshore submerged lands?

Question 6: Should the extension of the Arco Pier constructed in 1976 be considered a part of the mainland for the purposes of measuring the three-mile Submerged Lands Act grant to Alaska in this portion of the leased area (assuming the submerged lands involved do not belong to Alaska on some other basis).

Question 7: Are Harrison Bay and Smith Bay part of National Petroleum Reserve-Alaska?

Question 8: Is Peard Bay part of National Petroleum Reserve-Alaska?

Question 9: Did the application for withdrawal and crea-

tion of the Arctic Wildlife Range, filed in 1958 but not finally confirmed until 1960, effectively withhold from Alaska any offshore submerged lands included within the application?

Question 10: Assuming the acreage included in the 1958 application for the Arctic Wildlife Range was effectively withheld from Alaska, does the Range embrace the submerged lands between the mainland and the barrier islands in the area between the Canadian boundary and Brownlow Point?

Supplement to Joint Statement of Questions Presented and Contentions of the Parties (September 1980)

Question 11: Are the submerged lands within Wainwright Inlet and the Kuk River, Kugrua Bay and River, and other small inlets, bays and river estuaries, between Icy Cape and Point Barrow and between Point Tangent and the Colville River, within the boundary of the National Petroleum Reserve-Alaska?

Question 12: Should the extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the "leased area," be determined on the basis of "straight baselines"?

Question 13: Should the extent of Alaska's offshore submerged lands between Icy Cape and the Canadian border, not included within the "leased area," be determined on the basis that the waters between the mainlands and the barrier islands are inland waters, even if the "straight baseline" contention is not accepted?

Second Supplement to Joint Statement of Questions Presented and Contentions of the Parties (July 1984)

Question 14: Are certain geographic features within the Beaufort Sea, which appear on nautical charts published by

the federal government but not on maps prepared by the State of Alaska in 1981 and 1982, to be deemed low-tide elevations and thus salient points from which the submerged-lands grant to Alaska is to be measured?

Question 15: Is the southern portion of the area shown as "Harrison Bay" on NOS chart 16064 a juridical bay, and if so, what is the location of the line enclosing the inland waters of the bay, from which the 3-mile grant to Alaska is to be measured?

APPENDIX B
REPORT OF JANUARY 10, 1984

No. 84, Original

In the Supreme Court

OF THE

United States

—
OCTOBER TERM, 1983
—

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF ALASKA

**REPORT OF SPECIAL MASTER ON MOTION OF
INUPIAT COMMUNITY OF THE ARCTIC SLOPE
AND UKPEAGVIK INUPIAT CORPORATION
FOR LEAVE TO INTERVENE**

J. KEITH MANN
Special Master

January 10, 1984

No. 84, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF ALASKA

REPORT OF SPECIAL MASTER ON MOTION OF INUPIAT COMMUNITY OF THE ARCTIC SLOPE AND UKPEAGVIK INUPIAT CORPORATION FOR LEAVE TO INTERVENE

INTRODUCTION

This Interim Report is confined to the Motion to Intervene filed on May 12, 1981, by the Inupiat Community of the Arctic Slope and the Ukpeagvik Inupiat Corporation and referred by the Court to its Special Master on June 8, 1981. 452 U.S. 913.

For the reasons elaborated herein, the Master has concluded that limited intervention should be permitted and submits his recommendations accordingly. *Infra*, pp. 41-42. With the concurrence of all parties, however, it is respectfully suggested that the Court not now review these recommendations, and instead, merely order the present Report filed, allowing the parties, or any of them, to file exceptions if so advised at the conclusion of the case when the Master's final Report is submitted.

This course has recommended itself to the parties and the Special Master so as to avoid delay in the completion of the hearing. The parties have agreed upon a schedule for further proceedings, approved by the Master, which (although it may have to be revised in limited respects) would have to be set aside, causing perhaps a year's postponement, if the Court were to undertake review of the Report on Intervention in this Term. On the other hand, given the very limited scope of the intervention allowed, it is not anticipated that treating the applicants as parties for the remaining proceedings before the Master will impose a substantial additional burden or cause delay.

In these circumstances, it seems appropriate to follow the procedure the Court accepted in *Arizona v. California*, 444 U.S. 1009 (1980). There, the Special Master reported to the Court his intention to permit five Indian Tribes to intervene in the proceedings before him, and the Court declined immediately to review that ruling, notwithstanding the plea of the State parties. This was, however, without prejudice to the right of the State parties to challenge tribal intervention at the conclusion of the case. See *Arizona v. California*, No. 8, Orig., 103 S. Ct. 1382 (1983).

DISCUSSION

The body of this report is organized as follows: first, the background of the litigation and of the motion for intervention is presented; second, Alaska's claim that the State's sovereign immunity bars intervention is considered; third, the implications of the Federal Rules of Civil Procedure are discussed; and finally, the special nature of original jurisdiction lawsuits and the circumstances of this case are examined to determine if an outcome should be reached

different from that suggested by the Federal Rules of Civil Procedure.

I

BACKGROUND OF LITIGATION

In 1979, the Supreme Court exercised its original jurisdiction under Article III, § 2 of the United States Constitution to hear this case, which relates to the location of the northern boundary of the State of Alaska. 442 U.S. 937 (1979). Alaska replied to certain of the United States' claims regarding the "Dinkum Sands" area with counterclaims relating to the Arctic National Wildlife Range and the National Petroleum Reserve-Alaska. After these preliminary pleadings were filed, the Court referred the United States' complaint to the Special Master. 444 U.S. 1065 (1980). Alaska's motion for leave to file the counterclaim was also subsequently referred to the Special Master. 445 U.S. 914 (1980).

In May 1980, the parties submitted to the Master a *Joint Statement of Questions Presented* (hereinafter the "*Joint Statement*"). A hearing was held before the Special Master on July 28 and 29, 1980, at which time testimony was taken on issues regarding Alaska's counterclaims. In September 1980, the parties supplemented the *Joint Statement* with three additional questions.

On May 12, 1981, the Inupiat Community of the Arctic Slope, a federally recognized Indian tribe,¹ and the

¹So styled in the motion for leave to intervene and complaint in intervention. Alaska disputes the particular status. The original parties, seeking to avoid unintended collateral effect, suggest that the characterization be amended to read "federally recognized Alaska Native group."

Ukpeagvik Inupiat Corporation, a native village corporation, moved for leave to intervene in the case. On June 8, 1981, the Supreme Court referred the motion to the Master. 452 U.S. 913 (1981).

Briefs in opposition to the motion were filed by the United States and by the State of Alaska. The Amoco Production Company, *et al.*, high bidders in a joint federal-state lease sale in the disputed area, filed as *amici curiae* a brief in opposition to the motion. Movants filed a reply brief. Argument was held before the Master at Stanford, California on March 26, 1982, with the above parties and *amici* participating.

In their reply brief, movants adopted an alternative suggestion made by the United States in its brief, *Memorandum for United States*, p. 9, that movants' participation be limited to issues already before the Master but on which no testimony had yet been taken. At the hearing, movants specifically limited their motion to those questions presented by the parties in the *Joint Statement* and the supplement thereto but not heard at the hearing of July 28 and 29, 1980. *Record of Proceedings before the Special Master*, pp. 17-18. (Hereinafter cited as "*Record*.")

As counsel for the United States has observed, this limitation on the scope of the proposed intervention makes moot the claims of the United States, Alaska, and the *amici* that the intervention would raise new issues, or require the Master to reopen the record with respect to Alaska's counterclaims, which were considered at the hearing of July 28

and 29, 1980. *Record*, p. 24. The Master shares the concerns expressed that this litigation not become a pretext for hearing issues outside of the appropriate scope of a suit under the Court's original jurisdiction and that the proposed intervention not delay the progress of the case by requiring additional excursions into areas already explored. The statements of movants in the reply brief and at the hearing were therefore taken as effectively modifying the motion, and the following report is based upon the premise that the motion is limited to intervention with respect to those issues on which testimony has not yet been taken: *viz.*, Questions 2 through 5, 12, and 13 of the *Joint Statement* and the supplement which the parties have filed. Notwithstanding that there may be attempts by one or more of the parties to inject new issues into the litigation, the Master sees no basis for distinguishing this case from the myriad of cases in which limited intervention has been permitted.²

We also believe that if the motion as limited is granted, there is no reason that the Master and the Court will not be able to restrict the inquiry to claims already raised by the sovereigns, *cf. Utah v. United States*, 394 U.S. 89, 96 (1969), and therefore within the scope of the Court's jurisdiction already exercised over this matter.

²That such limitations are appropriate is clearly indicated in the Advisory Committee's Note to the 1966 amendment to Rule 24(a): "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." 39 F.R.D. 69, 111 (1966).

II

THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY

In its brief, Alaska argues that granting intervention would abrogate the sovereign immunity of states reflected in the Eleventh Amendment to the United States Constitution.³

At the hearing, however, Counsel for Alaska acknowledged that all the cases cited by the State in support of its view that intervention is barred by the Eleventh Amendment involved attempts to bring actions, rather than attempts to intervene in matters already properly before the court. *Record*, p. 34.⁴

The scope of the immunity doctrine was well summarized by the Court in *Monaco v. Mississippi*, 292 U.S. 313 (1934). There the Court stated that the extension of the immunity doctrine in *Hans v. Louisiana*, 134 U.S. 1 (1890) (to include suits by citizens of a state against that state) merely reflected the fact that immunity is presumed to exist unless surrendered "in the plan of the Constitution" (citing *The Federalist* No. 81 (A. Hamilton)). The Court illustrated its point by citing cases in which state sovereign immunity

³The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state."

⁴Counsel for Alaska also stated that "it is certainly not necessary from the State's standpoint that we get a ruling in the case that sovereign immunity is a bar to this type of intervention. We don't believe that it is essential as a matter of State's rights. . . ." *Record*, p. 35.

was held to bar suits by congressionally created corporations, *Smith v. Reeves*, 178 U.S. 436 (1900), or under the federal courts' admiralty jurisdiction, *ex parte New York* (No. 1), 256 U.S. 490 (1921), even though the Eleventh Amendment provided no explicit protection against such suits. In no case cited by Alaska has state sovereign immunity been held to bar intervention by a private party in a suit properly before the Court under its original jurisdiction.

In two cases in which a state has raised the sovereign immunity issue with respect to intervention, the Court has explicitly refused to address the issue and has denied intervention on other grounds. In *New Jersey v. New York*, 345 U.S. 369 (1953), Philadelphia had attempted to intervene in 1952 in a suit that had been commenced by New Jersey against New York in 1929, and in which the Commonwealth of Pennsylvania had intervened in 1930. The Court stated, "The view we take of the matter makes it unnecessary to decide whether Philadelphia's intervention in the pending litigation would amount to a '... suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State . . . ' in violation of the Eleventh Amendment." 345 U.S. at 372. The Court relied instead on the *parens patriae* doctrine to hold that Philadelphia's interests were adequately protected by Pennsylvania's presence in the suit.

In the *Utah* case, the Special Master had denied an attempt by Morton Salt, *inter alia*, to intervene in a dispute over the Great Salt Lake. The Master's decision was based on Utah's sovereign immunity claim. The Court stated, "[W]e affirm the Master's decision . . . for reasons which

are somewhat different from those advanced in the Master's Report. . . . "We do not find it necessary to reach the ground adopted in the Report." *Utah v. United States*, 394 U.S. 89 at 91-92 (1969). Instead, the Court denied intervention because a stipulation entered into by the parties to the suit so limited the issues as to eliminate Morton's direct interest in participation.

In addition to the two cases cited above, in which the Court refused to reach the issue, the Court has never erected a sovereign immunity bar in cases in which a state has objected to intervention but has not explicitly raised an Eleventh Amendment claim. See, e.g., *South Dakota v. Nebraska*, 434 U.S. 948 (1977) (intervention by South Dakota citizens permitted over South Dakota's objections).

Furthermore, the Court rejected an Eleventh Amendment claim in *Maryland v. Louisiana*, 451 U.S. 725 (1981). Although not speaking directly to Louisiana's Eleventh Amendment argument that seventeen private pipeline companies should not be permitted to intervene in a suit challenging Louisiana's "first-use" tax on natural gas, the Court noted "those companies have a direct stake in this controversy, and in the interest of a full exposition of the issues, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of private parties in original actions. See *Oklahoma v. Texas*, 258 U.S. 574 (1922)." 451 U.S. at 745, n. 21.

Finally, in *Arizona v. California*, 103 S. Ct. 1382 (1983) (No. 8 Orig.), the Court rejected Arizona and California's

attempt to interpose an Eleventh Amendment objection against the motion of several Indian tribes for leave to intervene. The Court distinguished *New Jersey*, 345 U.S. 369, on the ground that the *parens patriae* doctrine adopted therein was inapplicable to cases involving Indian tribes. Citing *Maryland v. Louisiana*, the Court concluded that "the Tribes do not seek to bring new claims or issues against the states. . . . Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." 103 S. Ct. at 1389 (1983).⁵

In light of the earlier cases, and prudential considerations reflecting a desire to use most economically the limited resources of the federal judiciary, we conclude that the Eleventh Amendment does not pose an absolute bar to intervention by private parties in lawsuits brought under the Court's original jurisdiction. There are certainly limits to the scope of complaints in intervention which can be

⁵We note also that Judge Tuttle, as Special Master in that case, dealt extensively with this issue in his *Memorandum and Report on Preliminary Issues*, August 28, 1979. In recommending intervention over the Eleventh Amendment objection, Judge Tuttle stated that "[O]nce a state is brought properly within federal jurisdiction—in this case by the bringing of a suit by another State—the Court may hear at least certain claims against the state"; and "The Supreme Court, once it has exercised its original jurisdiction over a suit involving sister states and the United States, may entertain the ancillary claims of non-sovereign litigants even though standing by themselves these claims would not be within the Court's original jurisdiction, *Texas v. Louisiana*, 416 U.S. 965 (1974), or even within federal jurisdiction, *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922)." Tuttle, *Memorandum and Report on Preliminary Issues*, August 28, 1979 at 23, 21.

heard in the absence of an independent basis for federal jurisdiction; there are also special considerations which limit the sorts of claims the Court may wish to hear under its original jurisdiction. We find, however, that these limits are separate and distinct from Alaska's Eleventh Amendment claim, which the Master rejects.

III

THE FEDERAL RULES OF CIVIL PROCEDURE

Supreme Court Rule 9.2 states that the Federal Rules of Civil Procedure are to be used as a "guide" to procedure in original actions before the Court "where their application is appropriate." Actual practice by Special Masters has varied, however, from rigorous analysis (*see, e.g., Arizona v. California*, No. 8 Original, *Memorandum and Report on Preliminary Issues*, August 28, 1979), to casual reference (*see, e.g., South Dakota v. Nebraska*, No. 72 Original, *Report of Special Master of June 8, 1977*), to complete disregard (*see, e.g., Texas v. Oklahoma*, No. 85 Original, *Report of Special Master of January 23, 1981*). We interpret Rule 9.2 to indicate that application of the Federal Rules of Civil Procedure is appropriate unless there are overriding concerns arising out of the nature of the Court's original jurisdiction or out of the special circumstances of the case which mandate a different treatment from that which the Federal Rules would suggest. In other words, while there is no "intervention of right" in original jurisdiction proceedings, in the absence of overriding considerations, deference should be paid to the Rules.

Rule 24 provides for intervention on the following grounds:

(a) *Intervention of Right*. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention*. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when the applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

A. Permissive Intervention under Rule 24(b)

As Alaska correctly observes in its brief, "Permissive intervention ordinarily must be supported by independent jurisdictional grounds . . ." *Brief of the State of Alaska*, p. 14. Professors Wright and Miller comment as follows on the subject:

. . . [T]hat there must be independent jurisdictional grounds for permissive intervention under Rule 24(b), was sound law prior to 1966 and should continue to be the rule today, as indeed the courts have held [citing cases from the 1st, 3d, 4th, 7th, 8th, and 9th Circuit Courts of Appeal, and numerous District Court cases]. . . . The rule of complete diversity would be virtually obliterated, and the federal courts would be burdened with the decision of so many matters that are properly the business of the state courts, if so tenuous a connection as the existence of a common question of law

or fact were enough to dispense with ordinary requirements of jurisdiction and permit litigants to have their independent claims or defenses tried in federal court though, absent intervention, they would not have been able to do so. . . .

There were a few cases that said that independent jurisdictional grounds are not required even for permissive intervention. Those cases rely primarily on a broad statement by the Supreme Court, made long before the civil rules introduced the distinction between intervention of right and permissive intervention, and perhaps best understood only in the light of the case in which it was made. With so many decisions to the contrary, those few cases cannot be regarded as authoritative.

Wright & Miller, *Federal Practice & Procedure*, Civil § 1917 (1972).

Movants clearly could not claim independent jurisdictional grounds for their appearance in an original action before the Supreme Court. They themselves advance no such claim.

It could be argued that the "independent jurisdiction" requirement need not apply in original jurisdiction cases; indeed the concerns giving rise to the requirement seem to apply more directly to the setting of the district courts.* The oft-stated concern of the Court about unwarranted expansion of original jurisdiction, however, suggests the conclusion that in the absence of an independent jurisdic-

*Such a conclusion might be inferred from the dictum of the Court in *Arizona v. California* that the intervenors in that case "... at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules." 103 S. Ct. at 1389. The Court allowed intervention on other grounds, however, and did not fully develop the analysis.

tional basis (intervention by a state or by the United States), intervention under Rule 24(b) is unavailable.

In the absence of such an independent jurisdictional basis, it is not necessary to explore the substantive implications of Rule 24(b) for the case at hand.

B. Intervention of Right under Rule 24(a)

1. *Timeliness of the Motion.* Although both the United States and Alaska alleged in their briefs that the motion for intervention is untimely, having been filed nearly two years after the suit began, the limitation on the scope of intervention agreed to by the movants cures any problem which might have existed.

The federal courts have indicated that especial liberality is to be applied with respect to timeliness under Rule 24(a). *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978), *McDonald v. E. J. Lavino*, 430 F.2d 1065, 1073 (5th Cir. 1970), *Diaz v. Southern Drilling*, 427 F.2d 1118, 1126 (5th Cir. 1970), *Walpert v. Bart*, 44 F.R.D. 359, 360-361 (D. Md., 1968).

Furthermore, the mere passage of time is not sufficient to make a motion untimely. *Legal Aid Society of Alameda Co. v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980), *Diaz v. Southern Drilling*, 427 F.2d at 1125, *Finch v. Weinberger*, 407 F.Supp. 34, 41 (N.D. Ga., 1975). A showing of prejudice or other special circumstances, in addition to the mere passage of time, is necessary.

By eliminating the possibility that matters already heard would have to be reopened, the limitation on the scope of

intervention accepted by the movants in their Reply Brief resolves the issue of any prejudice which could have arisen by intervention at this late date.⁷ In the absence of prejudice, and given the limitations to which movants have agreed, timeliness is not an issue here.

2. *Nature of Movants' Interest.* Movants claim that they hold unextinguished sovereign rights over portions of the territory that is the subject of this lawsuit between the United States and Alaska. They are prosecuting those claims in another forum, *Inupiat Community v. United States*, Civ. Action No. A81-019 (D. Al.) filed 1/19/81, *motion by defendants for judgment on the pleadings* granted 10/1/82, *Notice of Appeal* filed 11/29/82. Under the terms of the Alaska Native Claims Settlement Act (hereinafter "ANCSA"), 43 U.S.C. §§ 1601-1628, native claims "within Alaska" were extinguished. Movants assume *arguendo* that ANCSA is valid and that offshore areas that are deemed to be within Alaska's territorial water are within the meaning of the phrase "within Alaska" as it is used in ANCSA.

Given these assumptions, movants claim that their interest in the disputed territory, and their ability to advance that interest in the District Court and Court of Appeals, will be damaged to the extent that this case results in the awarding of territory to Alaska, because of the extinguishment provisions of ANCSA; in other words, to the extent

⁷The parties and amici also have expressed concern that intervention might retard the progress of the litigation. While it is our belief that intervention can occur without causing any undue delay in the case, we note that concern with delay (as opposed to untimeliness) arises only under Rule 24(b) and thus is not explicitly relevant to the Rule 24(a) analysis.

the United States prevails here, more territory will be available for native claims in an alternative form. Movants argue that the effect of ANCSA, combined with Alaska's claims in this lawsuit, constitute sufficient practical impairment or impediment to their ability to protect their interest to warrant intervention under Rule 24.

The parties and amici respond to these claims with two principal arguments. Amici argue that the complaint as filed in the District Court, and which is the basis of the interest for whose protection intervention is sought, and in which judgment was granted on the pleadings, is "patently without merit." Amici conclude that therefore "the complaint in intervention lacks the 'seriousness and dignity' to deserve filing before the Court." (*Brief of Amoco Production Company, et al.*, pp. 7-8.)

The United States and Alaska do not go quite so far. Counsel for the United States argued at the hearing that granting intervention might "be seeming to give substance to the claim [of the movants] and thereby . . . trespassing on the proceedings before the District Court . . ." "[G]ranting intervention might imply a holding [that movants' underlying claim is valid] . . . and prejudice the district court proceedings." To deny intervention would result in "remaining entirely neutral as to the viability of these claims. . . ." *Record*, p. 25.

Counsel for Alaska reiterated the point. "Granting intervention . . . as a necessary predicate requires almost a finding that their interest is substantial. . . ." "Denying intervention would avoid that problem of giving tacit recognition to their interest." *Record*, pp. 31-32.

The bulk of precedents under Rule 24 go in a diametrically opposite direction from the view advanced by Counsel for the parties and for *amici*.

Beginning with *Atlantis Development Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967), numerous cases have held that it is not appropriate for a court to inquire into the legitimacy or scope of the interest at stake in a motion for intervention and that *stare decisis* itself may provide a significant enough impediment to the enforcement of interests to warrant intervention.

Atlantis is so strikingly similar in its factual setting to the instant case that it merits a close look. In *Atlantis*, the Atlantis Development Corp. sought to intervene in a suit by the United States against, *inter alia*, Acme Development Corp. over title to various offshore coral reefs. Atlantis claimed that it in actuality owned the reefs on which Acme had attempted a construction project, and its claim was therefore adverse to both Acme's and the United States'. Particular attention should be paid to the following from Judge John R. Brown's opinion:

The Government would avoid all of these problems [of intervention] by urging us to rule as a matter of law on the face of the moving papers that the intervenors could not possibly win on the trial of the intervention and consequently intervention should be denied.

... [I]t is, of course, conceivable that there will be some instances in which the total lack of merit is so evident from the face of the moving papers that denial of the right of intervention rests upon a complete lack of a substantial claim. But it hardly comports with good administration, if not due process, to determine the merits of a claim ... by denying access to the court

at all. This seems especially important when dealing with interests in the outer Continental Shelf. . . . If in its claim against the defendants in the main suit, these questions [regarding U.S. jurisdiction over the Continental Shelf] are answered favorably to the Government's position, the claim of Atlantis for all practical purposes is worthless [because *stare decisis* would make it impossible for Atlantis effectively to raise its claim against the U.S. in another court].

379 F.2d at 827-828.

It is worthy of note that the movants would be bound by more than *stare decisis* with respect to land adjudicated to be Alaska's in this case, because under ANCSA the intervenors would have no claim at all. The *Atlantis* court concluded that "*stare decisis* may . . . supply that practical disadvantage which warrants intervention of right." 379 F.2d at 829.

Atlantis has been widely followed both with respect to the level of inquiry into the nature of the interest asserted and with respect to the holding that *stare decisis* provides the necessary impediment to warrant intervention. Regarding the latter, see *Nuesse v. Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967), *Martin v. Traveler's Indemnity Company*, 450 F.2d 542, 554 (5th Cir. 1971), and *Francis v. Chamber of Commerce of United States*, 481 F.2d 192, 195 n.8 (4th Cir. 1973). In *Corby Recreation Inc. v. General Electric Company*, 581 F.2d 175, 177 (8th Cir. 1978), the court stated, "The inhibiting effect of *stare decisis*, coupled with assertion [by the intervenor] of an interest nearly identical to and perhaps in conflict with that alleged by *Corby* in the main action, furnishes the practical disadvantage required

for intervention as a right." (Citing *Francis*, *Nuesse*, and *Atlantis*.)

With respect to the nature of the interest required to justify intervention, in *Corby* the court also asserted that "[T]he well-pleaded allegations of [the intervenor's] complaint [must be] accepted as true," citing *Kozak v. Wells*, 275 F.2d 104 (8th Cir. 1960). 581 F.2d at 177.

In the *Kozak* case Justice (then Judge) Blackmun had written for a unanimous three-judge panel:

For purposes of judging the satisfaction of these conditions [of Rule 24] we look to the pleadings, that is, to the motion for leave to intervene and to the proposed complaint or defense in intervention, and, absent sham and frivolity, we accept the allegations in those pleadings as true.

"The question of a petition to intervene is whether a well-pleaded defense or claim is asserted. Its merits are not to be determined. The defense or claim is assumed to be true on motion to intervene, at least in the absence of sham, frivolity, and other similar objections." *Otis Elevator Co. v. Standard Construction Co.*, D.C.D.Minn., 10 F.R.D. 404, 406.

"For the purposes of a motion to permit intervention, all allegations in the pleading, which the intervenors propose to serve when they are made parties to the action, must be deemed to be true." *Kaufman v. Wolfson*, D.C.S.D.N.Y., 137 F. Supp. 479, 481.

Clark v. Sandusky, *supra*, at page 918 of 205 F.2d; *Dalva v. Bailey*, D.C.S.D.N.Y. 158 F. Supp. 204, 207. Whether the allegations are eventually proved is beside the point for we are now concerned only with the question of right to intervene and not with ultimate results on the merits.

A Florida District Court had occasion to reexamine the issue of the permissible degree of inquiry into the merits of an intervenor's allegations in *Florida Power Corp. v. Granlund*, 78 F.R.D. 441 (M.D.Fla. 1978). Florida Power sought to block the State of Florida from intervening in an antitrust suit over oil purchases. In response to Florida Power's contention that the state lacked the requisite "interest" to justify Rule 24 intervention, the Court wrote,

The Court is not without guidance. Such is provided by the Fifth Circuit's decision in *Atlantis Development Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967). There the party opposing intervention urged the Fifth Circuit Court of Appeals to rule on the basis of the moving papers that the intervenors could not possibly win at trial—in effect, to examine the complaint as would be done under Rule 12(b)(6), Fed.R.Civ.P. This the Fifth Circuit refused to do. [Quoting the passage quoted at pp. 16-17, *supra*.]

Thus, regarding whether the complaint states a claim, the Court's obligation in circumstances such as these is limited to determining whether "total lack of merit is . . . evident from the face of the moving papers . . ." *Id.*

The State presents a number of claims in its intervening complaint; the Court cannot say that any of them on their face exhibit such a "total lack of merit."

78 F.R.D. at 443.

The cases discussed above represent but one view of the "interest" question, however. A second line of cases has developed along an alternative line. These basically turn on a distinction between those interests which are "direct" and those which are "contingent." The very nature of such

an inquiry is antithetical to the approach of *Atlantis* and its progeny.

The seminal case in this line is *Kheel v. American Steamship Owner's Mutual Protection & Indemnity Assn.*, 45 F.R.D. 281 (S.D.N.Y. 1968). In *Kheel* the court stated, "Movants, who are but five out of 120 negligence claimants, do not assert that they have proved their claims or reduced them to judgment." "The mere existence of a third person's contingent interest in the outcome of pending litigation is insufficient to warrant intervention." 45 F.R.D. at 284.*

Clearly the emphasis placed by *Atlantis* and following cases on *stare decisis* as an impediment to vindication of an interest is irrelevant to the reasoning of *Kheel*. In *Atlantis* and its progeny, the fact that an additional lawsuit would

**Kheel* was favorably cited in *Liberty Mutual Insurance Co. v. Pacific Indemnity Co.*, 76 F.R.D. 656 (W.D.Pa. 1977). The Liberty Mutual court wrote,

The courts have agreed that the interest required must be a "direct, substantial, legally protectable interest in the proceedings," *Hobson v. Hansen*, 44 F.R.D. 18, 24 (D.D.C. 1968). . . . The interest must be a "present substantial interest as distinguished from a contingent interest or mere expectancy," [citation]. "[A]n interest, to satisfy [Rule 24(a)] must be significant [and] must be direct rather than contingent [citation]."

Analysis of cases involving interests factually similar to [the instant case] reveals that an interest contingent upon a favorable result in an *associated* lawsuit is not an interest sufficient to require intervention under Rule 24(a).

76 F.R.D. 656, 658 (1977).

Liberty Mutual involved an attempt of a state court personal injury plaintiff to intervene in a federal diversity suit between insurance companies attempting to sort out their respective obligations under overlapping insurance policies.

be required to vindicate the interest, and the fact that *stare decisis* would affect that subsequent litigation, was the basis for permitting intervention. In *Kheel*, the fact that a subsequent lawsuit would be required, and the implied "contingent" nature of the claim asserted in the petition for intervention, became the basis for denying intervention.

There seems to be no sure way to distinguish those cases in which the *Atlantis* logic is to be applied, and those to which *Kheel* is more applicable, although the *Kheel* court made much of the fact that only legal issues remained at the time intervention was sought. Indeed, we find no case in which a reconciliation of the two approaches is attempted. In *Atlantis*, Judge Brown did indicate that the *stare decisis* rule might be most appropriately applied when the subsequent claim might be against one of the parties to the original action, as in the instant case, and might stand on the same bases as one of the original claimants. Judge Brown surmised that in such a case "[t]he Court before whom the potential parties in the second suit must come [to petition to intervene] must itself take the intellectually straightforward, realistic view that the first decision will in all likelihood be the second and the third and the last one." 379 F.2d at 829. Because of the unique circumstances of ANCSA, that reasoning applies here perhaps to an even greater extent than it did in *Atlantis*.*

*As Counsel for the United States conceded at the hearing "[a] decision by the Supreme Court of the United States fixing the boundary, I think, in the real world sets a precedent which would effectively bar any further evidence on that question. . . . [i]f the United States were not adequately representing their interests as far as the interest of the Intervenor, it would be right to allow them to speak for themselves." *Record*, p. 29. (See *infra* p. 22, regarding the issue of adequacy of representation.)

There are literally dozens of cases of proposed interventions which have been decided on the "interest" question. As Judge J. Skelly Wright wrote in *Nuesse*, "we know of no concise yet comprehensive definition of what constitutes a litigable interest for purposes of standing and intervention under Rule 24(a)." "[T]he interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." 385 F.2d at 700.

While we have noted the rejection by the District Court of movants' claims, in the absence of a final judgment in that matter we are not in a position fairly to conclude that those claims are "totally without merit" as *amici* would have us do, or represent "sham or frivolity" as Judge Blackmun suggested in *Kozak* would be necessary. On the basis of the precedents, we believe that an analysis under Rule 24 leads to the conclusion, contrary to the assertions of Counsel for the parties and for *amici*, that a denial of intervention for lack of an interest is a greater statement on the merits than is permitting intervention. We do not share the suggestion that permitting intervention will somehow improperly influence proceedings before another tribunal. If such were the case, however, the remedy lies with an appeal of that court's decision, not with an improper resolution here of the petition for intervention. We conclude that movants adequately meet the "interest" test of Rule 24(a).

3. *Adequacy of Representation.* Under the analysis thus far presented, Rule 24(a) would mandate intervention "unless the applicant's interest is adequately represented by existing parties." As noted earlier, for the United

States, as well as for movants, this issue is at the crux of the motion.¹⁹

Movants concededly seek the same result in this lawsuit as does the United States: a minimization of the territory that is deemed to be Alaska's, and that therefore would be, from movants' perspective, unreachable because of ANCSA.

Movants nevertheless attack on several grounds the ability of the United States to represent their interests adequately. Included among these are that movants and the United States are in an ultimate sense adversely situated with respect to the ownership of the territory; that the United States may wish to settle the dispute in a manner adverse to movants, to save litigation costs, because of various international law concerns not directly relevant to this case, or because of a desire to eliminate movants' ability to prosecute their claims in another forum; and that as a matter of law the United States is an unsuitable representative for Native-American petitioner-intervenors.

Rule 24(a), as noted, requires that intervention be permitted when certain specified conditions are met "unless the applicant's interest is adequately represented by existing parties." Prior to 1966, the Rule had required intervention "when the representation of the applicant's interest by existing parties is or may be inadequate."

Numerous cases have concluded that the 1966 amendment to the Rule shifts the burden of persuasion to the party

¹⁹See statement of Deputy Solicitor General Claiborne cited at n.9 *supra*.

opposing intervention and is designed to make intervention more freely available.¹¹ See, e.g., *Nuesse*, 385 F.2d at 702.

The Supreme Court, in *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), took a slightly different approach and stated that the Rule's requirement "is satisfied if the applicant shows that representation of his interest 'may be' [paraphrasing the pre-1966 version of the Rule] inadequate and the burden of making that showing should be treated as minimal." 404 U.S. at 538, n. 10.

The mere fact that a petitioner-intervenor seeks the same result in a lawsuit as a party, or seeks to prosecute a claim against the same defendant, does not result in and of itself in a finding of adequate representation. In *Trbovich*, for instance, the Secretary of Labor had brought suit to set aside an allegedly improper union election. *Trbovich*, a union member, moved to intervene "(1) to urge two additional grounds for setting aside the election, (2) to seek certain specific safeguards with respect to any new election that may be ordered, and (3) to present evidence and argument in support of the Secretary's challenge to the election." 404 U.S. at 529-530. The Court reasoned from the statute that the interests of *Trbovich* and the Secretary were "related, but not identical," 404 U.S. at 538, and permitted intervention.

Justice Blackmun, as a Circuit Court judge, wrote in a classic formulation that inadequacy of representation may be shown "by proof of collusion between the representative

¹¹We note there have been dissenting voices on the subject. *Edmunson v. Nebraska ex rel. Meyer*, 383 F.2d 123 (8th Cir. 1967) and *In the Matter of American Beef Packers Inc.*, 457 F. Supp. 313 (D.Neb. 1978).

and an opposing party, by the representative having or representing an interest adverse to the intervener, or by the failure of the representative in the fulfillment of his duty." *Stadin v. Union Electric Co.*, 309 F.2d 912, 919 (8th Cir. 1962), cert. den., 373 U.S. 915 (1963).¹²

The *Stadin* formula has been used as a "strict test" to be applied when "the interest of the applicant and existing plaintiff are precisely identical" in the suit in which intervention is sought, but differ in terms of ultimate objectives. See *Pierson v. United States*, 71 F.R.D. 75, 78 n.5 (D.Del., 1976), *Walden v. Elrod*, 72 F.R.D. 5, 10 (W.D. Okla., 1976), and *United States v. I.B.M.*, 62 F.R.D. 530, 537-538 (S.D. N.Y., 1974). These courts would limit the *Trbovich* "minimal burden" test to cases in which the petitioner-intervenor and the alleged representative have adverse interests in the very suit in which intervention is sought. The distinction between identity of interest in the lawsuit in which intervention is sought, and "ultimate" identity of interest, is crucial to the analysis.

One perspective takes a very narrow view of identity. In *Atlantis*, the court stated, "On the basis of the pleadings [and the court then cited *Kozak* and *Stadin*, regarding the need to accept the pleaded allegations as true], Atlantis is without a friend in this litigation. The Government turns on the defendants and takes the same view both administratively and in its brief here toward Atlantis. The defendants, on the other hand, are claiming ownership in and the

¹²Judge Blackmun's opinion was written before the 1966 rule change, reducing or shifting the burden of proof with respect to showing inadequacy.

right to develop the very islands claimed by Atlantis." 379 F.2d at 825.

The existing defendants in *Atlantis* were in fact advancing the very same arguments that Atlantis wanted to; Atlantis was permitted to intervene precisely because a Government victory over the defendants would have, by *stare decisis*, made it difficult for Atlantis to advance similar claims against the Government in a subsequent lawsuit.

The logic of *Atlantis* has been followed in several subsequent cases. In *Diaz v. Southern Drilling*, the court stated:

[A]ppellant asserts that the rights of the Government are adequately protected by the existing parties to the main action. We disagree. Appellant is correct in stating that the Government is adequately represented as to the issue of Trefina's recovery from Southeastern. Trefina entered the suit with the sole purpose of effecting this recovery. Nonetheless, the argument is lacking in merit. Appellant ignores the fact that no existing party to the suit views the Government's tax lien favorably. Certainly Trefina does not. When the supposed representative actually represents an interest adverse to the intervenor, the representation is obviously not adequate.

427 F.2d at 1125.

In the *Corby* case, cited earlier, the court stated, "Western and Corby assert seemingly conflicting damage claims, and Western alleges that Corby was negligent and breached its lease by under-insuring the property. Such adversity of interest meets the . . . 'minimal' requirement of showing that representation of the potential intervenor's interest may be inadequate [citing *Trbovich*]." 581 F.2d at 177. Intervention was therefore permitted.

In *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), the United States intervened as plaintiff on its own behalf as owner of the Santa Fe National Forest, and in a fiduciary capacity on behalf of four Indian Pueblos, in a suit brought originally by New Mexico in an attempt to have the Pueblos' water rights declared subject to New Mexico's system of water rights adjudication. From the sketchy details provided in the opinion it would appear the United States was advancing the same claim on both its own behalf and on behalf of the Pueblos: that *none* of the water involved was subject to state law. The Commissioner of Indian Affairs had recommended that the Pueblos retain private counsel, but the United States objected. The Court of Appeals stated:

The claim that the Pueblos are adequately represented by government counsel is not impressive. Government counsel are competent and able but they concede that a conflict of interest exists between the proprietary interests of the United States and of the Pueblos. In such a situation, adequate representation of both interests by the same counsel is impossible.

537 F.2d at 1106.

In three of the above-described cases (all except *Aamodt*), the factor which blocked "adequate representation" was based on the difficulty of enforcement of the interest in a subsequent lawsuit, coupled with an evaluation of the importance of allowing those affected by a decision to speak for themselves. Within the cases themselves, no conflict of interest existed. In *Atlantis*, *stare decisis* was deemed to bar for all practical purposes a subsequent suit by Atlantis if Atlantis' alleged representatives were to lose their own suit. A similar problem was cited in *Corby*, 581

F.2d at 177, as well as the fact that Corby itself had indicated that it did not feel it could adequately represent the intervenor's interests.

The view that adequacy of representation may be dependent on whether the parties are *ultimately* adverse to each other thus seems to grow out of the view that subsequent lawsuits may not be readily available to enforce any interest that exists.

On the other hand, some courts have refused to acknowledge the need for (or unavailability of) a subsequent lawsuit as a basis for finding inadequacy of representation.

MacDonald v. United States, 119 F.2d 821 (9th Cir. 1940), involved a suit by the government against a railroad regarding ownership of subsurface minerals within the railroad's right-of-way. MacDonald claimed that as holder of a homesteading patent, he in fact was the owner of the minerals, and sought to intervene. The court stated:

Subdivision (a) of Rule 24, permitting intervention as a matter of right, provides, so far as pertinent here, that the application shall be granted "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." Both conditions must be shown to exist. There is no reason to believe that the government's representation of MacDonald's interest is inadequate here, or that it was inadequate below. For that matter, both here and below, he presented an elaborate brief on the merits of the case and was heard thereon as fully as though he had been allowed to intervene. On the whole, the government would seem to have a vastly greater interest in the success of its suit than the intervenor.

119 F.2d at 827.

It is clear that the court was not impressed with the fact that by *stare decisis* the intervenor would have been unable to press his claim against the railroad if the United States should lose its suit, because it found that "for the purpose of the suit the two interests were identical." 119 F.2d at 827.

The *MacDonald* court's approach was seemingly adopted in *International Tank Terminal Ltd. v. M/V Acadia Forest*, 579 F.2d 964 (5th Cir. 1978). The court stated, "It is clear from our summary of the interrelationships among the five companies involved here that the appellant and the defendants have the same objective in the present suit. The possibility that future arbitration might occur in which the interests of the defendants and the [intervenor] might clash does not demonstrate the necessary adverse interest in the present suit." 579 F.2d at 968.

The decision in *International Tank* relies upon *Virginia v. Westinghouse*, 542 F.2d 214 (4th Cir. 1976). The operative language in *Virginia*, cited by the court in *International Tank*, is, "When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented. . . ." 542 F.2d at 216. We are therefore left with the task of determining what is meant by the term "ultimate objective." A close reading of *Virginia*, which involved an attempt by the Commonwealth of Virginia to intervene in Virginia Power's uranium pricing suit against Westinghouse, shows that the *Virginia* court looked at "ultimate interest" in a sense that went beyond the existing lawsuit. *International Tank* would thus appear to be a misreading of *Virginia*.

The *MacDonald* and *International Tank* view is urged upon the Master by the parties in this case who oppose intervention. The *Atlantis*, *Diaz*, *Corby*, and *Aamodt* view stands in stark contrast.

It seems clear that *Atlantis* and the cases which follow it were decided as they were because (1) the courts looked to the ultimate relationship of the intervenor and the representative, rather than to their relationship "for purposes of the suit"; and (2) these courts would impose a virtually irrebuttable presumption of inadequacy when the intervenor would be effectively and permanently blocked from asserting his interest if the representative were to lose his lawsuit. One cannot deny, however, that *Atlantis* and *MacDonald* reach opposite conclusions in similar factual settings. The Master believes that the *Atlantis* court's view more accurately represents the law.

Notwithstanding the irreconcilability of *Atlantis* and *MacDonald*, a genuine issue nevertheless remains with respect to the applicable standard when a petitioner-intervenor and its "representative" have identical interests in the pending lawsuit, but are adverse in an "ultimate" sense.

We find appealing the resolution proposed by the courts cited on page 25, *supra*: when the parties are adverse in the pending lawsuit, the "minimal burden" test of *Trbovich* applies; when the parties are adverse only in an "ultimate" sense, Judge Blackmun's test in *Stadin* applies. Judge Edelstein has referred to this test as the "outcome-interest" test, and it certainly would seem to explain decisions such as *Atlantis* and cases which followed it. *U.S. v. I.B.M.* 62 F.R.D. at 538.

Professor David Shapiro takes a similar view in an oft-cited 1968 article, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721 (1968). Professor Shapiro did not directly address the distinction between adversity in the context of the existing lawsuit and "ultimate adversity," but approached the matter somewhat obliquely:

[A]dequacy of representation is a very complex variable indeed. At one extreme, when the applicant is seeking to assert his own separate claim for relief against one of the parties, it is not really an issue at all. At the other extreme, when the applicant is making no claim of his own but is seeking to assert the same position as one who is already a party and whose interests precisely coincide with his, the issue of adequacy should be, as Mr. Justice Stewart suggests, limited to questions of competence, collusion, and bad faith. But between these poles lies a substantial area where the question of adequacy is closely tied to that of interest. In these cases the applicant wants not to make his own claim but to support or supplement the position of one of the parties *whose stake in the proceeding differs from his*, though there may be no conflict of interest between them. The court's judgment in such cases should be influenced in part by the extent of the applicant's interest—do considerations of fairness strongly suggest that he be heard on a matter of this importance to him—and in part by the contribution that he can make to the court's understanding of the case in the light of his knowledge and concern.

81 Harv. L. Rev. at 748 (emphasis added, footnotes omitted).

The analysis suggested by Professor Shapiro and by the *I.B.M.*, *Pierson*, and *Walden* courts cited above can be readily applied to the instant case.

As noted above at p. 23, both movants and the United States have a similar object with respect to the case at bar: minimization of the territory adjudged to be Alaska's. Thus, they lack adversity of interest in the pending lawsuit, and the three-part *Stadin* test must be applied.

The first part of the test concerns "collusion." We find movants' claims on this score unconvincing. The fact that the parties made an agreement for a joint lease sale of mineral rights and for judicial resolution of the dispute does not make a case of collusion. Nor do we find a shred of credible evidence that the United States would collaborate with Alaska in order to prevent movants from pursuing their claims. Accordingly, we reject any attempt to prove inadequacy of representation on the basis of collusion.

The third element of the *Stadin* test—nonfeasance—is likewise clearly inapplicable here, as the United States is present, and makes every indication that it intends to pursue its claims.

The second element in the *Stadin* test—adversity of interest—is by far the most complex. It has already been established that with respect to the ostensible goals of the United States and movants there is no adversity of interest within the context of the case at bar. The issue then, to follow Professor Shapiro's prudential concern, is whether intervention is warranted because their interests are sufficiently adverse in the ultimate sense, and the movants' interest sufficiently important to them that they be allowed to speak for themselves.

In the present case, both the United States and the movants have adverse claims to the same territory. Movants and the United States are currently opposing parties in a lawsuit in another forum regarding that territory. The United States concedes that "if the United States were not adequately representing their interests . . . it would be right to allow them to speak for themselves."¹³ Yet movants argue vigorously that they have evidence to present to bolster the claims of the United States in this forum, but which they contend the United States will not use because the United States' case against movants before another tribunal might be damaged by presentation of that evidence.

We think these allegations meet the test. The claims of movants, accepted *arguendo* as valid, and the type of adversity of interest that is alleged, fall well within the requirements laid out in numerous cases cited and quoted above, including *Atlantis*, *Diaz*, *Corby*, and *Aamodt*.

This view is bolstered by the Court's recent conclusions in *Arizona v. California*. The Court stated, in permitting intervention over the States' objections, "The Tribes' interests . . . have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. Moreover the Indians are entitled 'to take their place as independent qualified members of the modern body politic.' " 103 S. Ct. at 1389. (Citations omitted, emphasis added.) If the Indians' right to intervene is vindicated when the United States has sued as trustee, as in *Arizona v. Cali-*

¹³See note 9 *supra*.

fornia, it ought to be vindicated when the United States is suing solely on its own behalf.

Alaska argues that when the Government is allegedly adequately representing the interest of a petitioner-intervenor, a special burden is imposed to overcome a presumption of adequacy. *Brief of the State of Alaska* p. 13. This principle was described by Justice Stewart, in his dissent to the Court's grant of intervention in *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*, 386 U.S. 129 (1967), as follows: "It has been the consistent policy of this Court to deny intervention to a person seeking to assert some general public interest in a suit in which a public authority charged with vindication of that interest is already a party." 386 U.S. at 149-150. With but one exception, all of Justice Stewart's citations, however, are to public interest cases involving antitrust, civil rights, environmental protection, or utility regulation statutes.¹⁴ We find the doctrine inapplicable to the case at bar, in which the Government is a party to protect its property interests rather than to assert a general public interest, and in which intervention is sought solely to preserve private rights.

We conclude that movants' claims are not adequately represented by the United States and that movants therefore meet the requirements of Rule 24(a).

¹⁴The exception is *MacDonald v. United States*, 119 F.2d 821, the facts of which are inapposite to the rationale described by Justice Stewart. Professors Wright and Miller, whom Alaska cites as the source of their claim on this score, cite the same cases as had Justice Stewart, including the apparently misplaced reference to *MacDonald*. Wright and Miller, *Federal Practice and Procedure Civil* § 1909 (1972).

IV

SPECIAL STANDARDS FOR INTERVENTION IN ORIGINAL JURISDICTION CASES

Supreme Court Rule 9.2, as noted above at page 10, suggests that the Federal Rules of Civil Procedure should serve as a guide, where appropriate, to procedure in original actions. We have noted further that actual practice with respect to intervention in such cases has varied widely.¹⁵

The parties and *amici* raise several general policy arguments against permitting intervention in this case which are more related to the nature of original jurisdiction than to the specific requirements of Rule 24 which have been addressed above.

Several of the issues considered herein have been addressed with respect to analysis of Rule 24. Here we consider arguments that a special, more stringent, standard should apply to these issues in the context of intervention in cases brought under the Court's original jurisdiction. These arguments, if valid, might lead to a conclusion that application of Rule 24 to the instant case is not appropriate and that the motion for leave to intervene should be denied. Each of these arguments will be considered in turn.

First, both Alaska and *amici* argue that the underlying claim of petitioner-intervenor lacks the "seriousness" and "dignity" that are requisite for filing original actions in the Supreme Court, citing *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

¹⁵See cases cited at p. 10, *supra*.

The cited case dealt with efforts to bring an action, not merely to intervene, however. The Court stated that

[T]he question of what is appropriate concerns of course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

406 U.S. at 93-94.

In the present case, the underlying claims are in fact being litigated in another, more appropriate forum; and intervention is sought solely to support the United States' position as to territory which movants might not be able to claim in any other forum because of ANCSA. As noted above, the United States itself undercuts the contentions of Alaska and *amici* with its acknowledgment that if it were determined that "the United States were not adequately representing . . . the interest of the Intervenor, it would be right to allow them to speak for themselves." *Record*, p. 29. We are not inclined to prejudge the legitimacy of the underlying claims by denying intervention here.

Furthermore, the concern expressed in *Illinois* regarding the "increasing duties with the appellate docket" is clearly inapposite in this case. Movants do not seek a new filing before the Court, and do not seek to litigate their underlying claims before the Special Master.

Second, Alaska, the United States, and *amici* all argue that the existence of movants' lawsuit in another forum eliminates the need for intervention. We believe this argu-

ment is not suited to the present posture of the case, in which movants only seek to present evidence to support the claims of the United States, in order to protect their interests in territories which may become subject to ANCSA to the extent Alaska prevails in this action. To the extent Alaska prevails here, movants are *barred* from prosecuting their claim elsewhere.

Third, Alaska, the United States, and *amici* all urge that especial attention be paid to *Utah v. United States*, 394 U.S. 89, in which the Court denied Morton Salt's petition for leave to intervene in a boundary dispute between the United States and Utah which was before the Court under its original jurisdiction. (See Part II, p. 7 above)

Morton had sought to intervene on the basis that its own interests in land surrounding the Great Salt Lake could be undermined if the suit were to proceed without its participation. The Court responded that its original jurisdiction is to be invoked "sparingly," and that there was "no compelling reason requiring the presence of Morton." 394 U.S. at 95.

The Court based its conclusion on the existence of a stipulation entered into by the parties which mooted any effect the suit might have had on Morton's interests. The Court rejected Morton's substantive challenge to the validity of the stipulation and concluded that ". . . we decline to permit intervention for the sole purpose of permitting a private party to introduce new issues which have not been raised by the sovereigns directly concerned." 394 U.S. at 96.

In *United States v. Alaska*, no such stipulation has been entered into; indeed, since any such stipulation would in

effect waive the mandatory provisions of a duly enacted statute, ANCSA, such a stipulation would in all likelihood be invalid. Furthermore, movants in *United States v. Alaska* have agreed to restrict themselves to issues already before the Master and to raise no new issues. Given these differences between the cases, analogy to *Utah v. United States* is far-fetched.

Fourth, Alaska argues that others may seek to intervene if movants are granted permission to do so. *Brief of the State of Alaska*, p. 5. *Amici* oil companies have indicated that they would consider moving to intervene if movants are granted their request. *Brief of amici curiae*, p. 1.

The Court in *Utah v. United States* referred to the possibility of multiple intervention, stating that permitting Morton to intervene might require the admission of "any of the other 120 private landowners who wish to quiet their title to portions of the relited lands, greatly increasing the complexity of the litigation." 394 U.S. at 95-96. The Court reached that conclusion only after deciding that the existence of the stipulation voided any compelling reason for intervention and on the assumption that intervenors would raise new issues regarding their own claims. The instant case has been distinguished with respect to these characteristics.

Given the restrictions to which movants have agreed, as presently informed the Master does not believe that the mere fact of their presence in the case would give rise to grounds for participation by others, either by those similarly situated to movants or by those adverse to them. In-

sofar as that is to become a problem, it will be sufficient to abide the event.¹⁶

In contrast to the arguments raised by those opposing intervention, this Master finds himself drawn to the words of Chief Justice Taney in *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854). Writing for the Court, he stated that with respect to original jurisdiction, it is the "duty of the Court to mould its proceedings for itself, in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred. And in doing this,

¹⁶The Special Master notes the concerns of *amici* and others regarding possible collateral effect on individuals or entities which may not be parties to this case, but which may be engaged in litigation over issues which are involved in the matter before the Special Master. It is observed that the doctrine of collateral estoppel applies only to those who are parties to the matter in which findings of fact are made, and that *amici* therefore could not be bound in other litigation if the Special Master were to make a finding of fact without the level of scrutiny which *amici* might feel was warranted. See Wright, Miller, and Cooper, *Federal Practice and Procedure*, Jurisdiction § 4416 (1981).

Nonetheless, the Special Master will undertake two steps to alleviate any concern which might have arisen. First, in the Final Report the Special Master will specifically recite that, pursuant to the doctrine of collateral estoppel, findings of fact are intended to bind only the parties to this litigation and not those who have not been able to participate. Second, at the request of *amici* or any of the parties, with respect to all issues in which intervenors participated pursuant to this Order, a draft Report stating the findings of fact, conclusions of law and recommendations of the Special Master may be circulated to the parties and to *amici curiae* Amoco Production Co. et al.; *amici* shall be permitted to draw the Special Master's attention to any unintended or unjustified effects that such findings, conclusions or recommendations might have in other litigation on individuals or entities not party to this litigation, and to file with the Special Master a brief with respect to those effects. All parties will have adequate time to respond to any such brief.

it was, without doubt, one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be obtained." 58 U.S. at 491.

In this case it is in the greatest national interest to clear title to this area once and for all, to ensure a stable and appropriate development of its resources, for reasons vital to our domestic economy and international strategic needs.

At the same time, movants raise claims to those areas which could be permanently extinguished, at least in part, depending on the outcome of this case. The "ends of justice" require that they be permitted to speak for themselves, and be heard, and present the evidence which they claim to possess and that otherwise would not be put in the record. Their participation should be strictly limited according to the terms of the Recommendations and Order that follow, and should continue so long as they can credibly allege an underlying interest in the subject matter of the controversy.¹⁷

¹⁷It is the Master's intention to minimize to the extent possible any duplication or delay that might result from movants' participation in the case—a desire presumed to be shared by Counsel. Coordination between the United States and movants in the presentation of evidence is to be expected. To invoke the example of Judge Tuttle, serving as Special Master, "... the order of proof and examination" by the United States and the movants should be "structured in a logical sequence which avoids duplication or accumulation," and where they are not so arranged or presented, Alaska in particular will be entitled to object. See *Arizona v. California*, No. 8 Original, *Memorandum and Report on Preliminary Issues*, August 28, 1979, p. 16.

RECOMMENDATIONS

For the reasons just stated, the Special Master recommends:

1. That the Motion to Intervene filed by the Inupiat Community of the Arctic Slope and the Ukpeagvik Inupiat Corporation be granted, to the extent and subject to the limitations hereafter stated;
2. That the intervention shall be restricted to Issues 2 through 5 identified by the original parties in their Joint Statement of Questions Presented and Contentions and Issues 12 and 13 of the Supplement thereto, and any related further issues bearing on the seaward boundary of the submerged lands of the State of Alaska which, at the request of one or both of the original parties, the Special Master shall agree to hear; in addition, intervenors may present evidence on matters already heard by the Special Master, to the extent that the Special Master receives new evidence on such matters, and such new evidence involves a new theory on which such matters may be decided, and not merely elaboration, extension or explanation of evidence already received;
3. That, with respect to those issues as to which intervention is granted, the intervenors shall be restricted to supporting, in whole or in part, the right, title and interest of the United States with respect to the lands or waters in dispute between the original parties; except in accordance with this paragraph, the intervenors shall not be permitted to advance in these proceedings any claim of right, title or interest they may have with respect to the lands or waters in dispute between the original parties; no evidence

supporting such a claim shall be received; and no such claim shall be the subject of any finding of fact, conclusion of law, or recommendation in this case.

As stated at the outset, the Special Master, with the concurrence of the parties, recommends that the Court defer review of these recommendations until the conclusion of the case and the submission of the final Report, reserving to the parties the right to file exceptions thereto at that time if so advised.

Respectfully submitted,

J. KEITH MANN
Special Master

Stanford, California
January 10, 1984

APPENDIX C
ORDER OF JANUARY 10, 1984

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 84, Original

UNITED STATES OF AMERICA,
Plaintiff

vs.

STATE OF ALASKA

vs.

INUPIAT COMMUNITY OF THE ARCTIC SLOPE
AND UKPEAGVIK INUPIAT CORPORATION,
Recommended Intervenor

BEFORE THE SPECIAL MASTER

ORDER

In light of the conclusions reached by the Special Master on the Motion to Intervene filed by the Inupiat Community of the Arctic Slope and the Ukpeagvik Inupiat Corporation recited in the draft interim Report circulated to the parties and to the petitioner-intervenor and *amici* and shortly to be filed with the Court, and upon consideration of the representations of the United States and the State of Alaska that neither party desires now to seek the Court's review of the Master's ruling on intervention:

IT IS ORDERED THAT:

1. From this date, and until and unless the Court shall

determine to review the Master's interim Report on Intervention, or until and unless the determination against petitioner-intervenors in *Inupiat Community of the Arctic Slope, et al. v. United States of America, et al.*, Civil No. A81-019 (D. Alaska), appeal pending, No. 82-3678 (9th Cir.) becomes final and a motion to dismiss is granted pursuant thereto, the applicants for intervention shall be deemed parties to this case in the proceedings before the Special Master, with all the rights of parties, subject to the limitations hereafter stated;

2. Intervention shall be restricted to Issues 2 through 5 identified by the original parties in their Joint Statement of Questions Presented and Contentions and Issues 12 and 13 of the Supplement thereto, and any related further issues bearing on the seaward boundary of the submerged lands of the State of Alaska which, at the request of one or both of the original parties, the Special Master shall agree to hear; in addition, intervenors may present evidence on matters already heard by the Special Master, to the extent that the Special Master receives new evidence on such matters, and such new evidence involves a new theory on which such matters may be decided, and not merely elaboration, extension or explanation of evidence already received;

3. With respect to those issues as to which intervention is granted, the intervenors shall be restricted to supporting, in whole or in part, the right, title and interest of the United States with respect to the lands or waters in dispute between the original parties; except in accordance with this paragraph, the intervenors shall not be permitted to advance in these proceedings any claim of right, title or interest they may have with respect to the lands or waters in dispute between the original parties; no evidence supporting such a claim shall be received; and no such claim shall be the subject of any finding of fact, conclusion of law, or recommendation in this case;

4. Within thirty days of the date of this Order the intervenors shall file a Statement of Position with respect to each of Issues 2 through 5, 12 and 13;

5. In the event the Master shall permit one or both of the original parties to supplement or amend their Joint Statement of Questions Presented, the intervenors shall file, within thirty days of such a ruling, a supplemental statement of position with respect to such additional issues or amended contentions;

6. By February 1, 1984, the parties, including the intervenors, shall propose appropriate modifications to the timetable for further proceedings before the Special Master agreed upon by the original parties and approved by the Master at the status conference held August 1, 1983;

7. Pending the Court's final decision in this case and its Orders as to allocation of costs, and so long as the intervenors shall be parties in this case, they shall bear one-fifth of the costs incurred by the Special Master and the compensation allowed to him attributable to all proceedings following June 8, 1981 in which the intervenors participate, the United States and Alaska each to bear two-fifths of such costs and compensation from that date.

Stanford, California, this 10th day of January, 1984.

(Signed) J. Keith Mann
J. KEITH MANN
Special Master

APPENDIX D
ORDER OF JUNE 3, 1986

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 84, Original

UNITED STATES OF AMERICA,
Plaintiff,

INUPIAT COMMUNITY OF THE ARCTIC SLOPE
AND UKPEAGVIK INUPIAT CORPORATION,
Recommended Intervenor

v.

STATE OF ALASKA

BEFORE THE SPECIAL MASTER

ORDER

On May 12, 1981, the Inupiat Community of the Arctic Slope and the Ukpeagvik Inupiat Corporation moved to intervene in this original action, claiming that they held unextinguished sovereign rights over certain territories involved in these proceedings, rights which were being prosecuted in another forum, *Inupiat Community of the Arctic Slope v. United States*, Civil No. A81-019 (D. Alaska). (As noted below, this other case was later decided adversely to Intervenor, 548 F. Supp. 182 (D. Alaska 1982), as was the appeal, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 106 S. Ct. 68 (1985).) The Supreme Court referred that Motion to its Special Master on June 8, 1981. 452 U.S. 913 (1981). Following briefs and oral argument, the Master prepared a Re-

port, submitted to the Court on January 10, 1984. That Report recommended limited intervention, subject to certain terms and conditions. The Special Master also recommended that the Court defer review of the recommendation until the conclusion of the case and the submission of the final Report. The Court has followed that course.

Also on January 10, 1984, and upon consideration of the representations of the United States and Alaska that neither party desired at that time to seek the Court's review of the Master's ruling on intervention, the Special Master issued an Order, based on the conclusions recited in the Report. This Order (not included in the printed report filed with the Court) provided, in part, that:

... until and unless the determination against petitioner-intervenor in *Inupiat Community of the Arctic Slope, et al. v. United States of America, et al.*, Civil No. A81-019 (D. Alaska), appeal pending, No. 82-3678 (9th Cir.) becomes final and a motion to dismiss is granted pursuant thereto, the applicants for intervention shall be deemed parties to this case in the proceedings before the Special Master . . . subject to the limitations hereafter stated . . .

Pending the Court's final decision in this case and its Orders as to allocation of costs, and so long as the intervenors shall be parties in this case, they shall bear one-fifth of the costs incurred by the Special Master and the compensation allowed to him attributable to all proceedings following June 8, 1981 in which the intervenors participate . . .

By letter of October 23, 1985, Intervenor informed the Special Master that their petition for certiorari from the decision of the Ninth Circuit unfavorable to them had been denied in *Inupiat Community of the Arctic Slope, et al. v. United States of America, et al.* and that they no longer appeared to satisfy the foregoing condition for continued participation.

The Special Master wrote the parties, including Intervenor and *Amici*, indicating his inclination to accept Intervenor's letter as akin to a motion to dismiss by analogy to FRCP Rule 41, and proposing, by the terms of the Order of January 10, 1984, that the Intervenor should be dismissed from further participation in these proceedings, subject to a continuing obligation for sharing of appropriate costs for a defined period. All Counsel have responded and concur with respect to the dismissal and its legal basis and have indicated their preferences with respect to the content of the Order.¹

Intervenor's dismissal, however, must be without prejudice to their obligation to bear their due share of the costs, subject to determination of the Supreme Court.²

In his Report, the Special Master noted the concerns of *Amici* regarding possible collateral effects of the Intervenor's participation on individuals or entities who are not parties to the case but may be engaged in litigation on related issues. *Amici* concur that the dismissal of the Intervenor renders

¹ Mason D. Morisset, Counsel for the Intervenor, has also advised that the Inupiat Community of the Arctic Slope "is virtually without any funding at the present time" and that the financial situation of the Ukepeagvik Inupiat Corporation "has also substantially worsened." The Intervenor has not participated in later proceedings following the hearing and briefing of the so-called Dinkum Sands issue.

² Mr. Morisset also requested that the final paragraph of the Order read:

The ultimate distribution of costs among plaintiff, defendant and intervenors will be determined by the Supreme Court upon final disposition of this action.

Nearly identical language appears in Paragraph 10 of the "Application of Special Master for Interim Compensation" submitted to the Court on November 20, 1985. (Paragraph 10 was inserted with the authorization of the original parties on the footing of an undertaking to cover costs in equal shares on an interim basis while reserving the right to seek partial reimbursement or indemnification from the Intervenor.)

moot the procedural representations to *Amici* contained in the Master's Report to the Court of January 10, 1984.

In light of the foregoing:

IT IS ORDERED THAT:

1. The Inupiat Community of the Arctic Slope and Ukepeagvik Inupiat Corporation are hereby dismissed from further participation in these proceedings, subject to the condition of paragraph (2); and

2. The Inupiat Community of the Arctic Slope and Ukepeagvik Inupiat Corporation remain liable for their portion of the costs incurred by the Special Master and the compensation allowed to him attributable to all proceedings in which they participated, following June 8, 1981 and preceding the date of this Order, as ultimately determined by the Supreme Court, the Court retaining such limited jurisdiction as is required to carry out this provision.

Stanford, California, this 3rd day of June, 1986.

(Signed) J. Keith Mann

J. KEITH MANN
Special Master

APPENDIX E
STIPULATION ON QUESTION 14

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No. 84, Original

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF ALASKA

STIPULATION

The United States of America, herein represented by its Solicitor General, and the State of Alaska, herein represented by its Attorney General, hereby stipulate as follows:

1. Question 14 of the parties' Second Supplement To Joint Statement Of Questions Presented And Contentions Of The Parties before the Special Master, July 1984, puts at issue the existence of six areas off the north coast of Alaska containing possible low-tide elevations as depicted on National Ocean Survey Charts Nos. 16066 (5th ed. 12/25/82), 16065 (5th ed. 2/26/83), 16064 (5th ed. 4/23/83), and 16044 (6th ed. 9/15/84). The parties have since conducted a joint survey of portions of that coast and agree that the nine low-tide elevations do not exist. Issue 14 may, therefore, be answered in the negative without the need for further proceedings before the Special Master.

2. The joint survey referred to above has established the existence of twelve other low-tide elevations off the north coast of Alaska between Pitt Point and Cape Halkett. The following is a list of salient points on those features:

STIPULATION ON QUESTION 14

POINT NO.	LATITUDE	LONGITUDE
F	70 53' 57.227"	152 41' 11.030"
E-3	70 53' 23.144"	152 35' 15.360"
E-2	70 53' 14.197"	152 34' 11.882"
E-1	70 53' 11.953"	152 33' 57.025"
D-3A	70 52' 09.399"	152 26' 21.437"
D-2	70 52' 08.450"	152 26' 16.712"
C-3	70 51' 35.978"	152 22' 47.853"
C-2	70 51' 27.026"	152 22' 08.198"
C-1	70 51' 22.338"	152 21' 52.904"
A-2	70 49' 33.732"	152 12' 48.405"
A-1	70 49' 12.614"	152 12' 01.158"
A-3B	70 49' 01.848"	152 11' 42.777"

Thus done and signed on behalf of the United States in Washington, D.C., this 17th day of July, 1987.

UNITED STATES OF AMERICA

By: (Signed) Michael W. Reed

Thus done and signed on behalf of the State of Alaska in Juneau, Alaska, this 10th day of August, 1987.

STATE OF ALASKA

By: (Signed) G. Thomas Koester

9
No. 84, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF ALASKA

ON THE REPORT OF THE SPECIAL MASTER

**EXCEPTIONS OF THE STATE OF ALASKA AND
SUPPORTING BRIEF**

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No. 84, Original

In the Supreme Court

OF THE

United States

October Term, 1995

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF ALASKA

ON THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF ALASKA

The Report of the Special Master addresses the rights of the State of Alaska under the equal footing doctrine and the Submerged Lands Act, 43 U.S.C. §§ 1301 et seq., along Alaska's north coast. The State excepts to three of the Master's recommendations: (1) that, where there are near-shore fringing islands less than ten miles apart, Alaska's rights are to be determined not under the 10-mile rule, which the Court in *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93 (1985), found was the United States' official policy from 1903 to 1961 but, instead, under the United States' current practice; (2) that the feature known as "Dinkum Sands" is not an island and thus is not part of Alaska's "coast line" for Submerged Lands Act purposes; and (3) that Alaska's entitlement to the tide and submerged lands within the exterior boundaries of the National Petroleum Reserve-Alaska was defeated by Alaska's Statehood Act. The Master discusses these matters at pages 19-174, 227-310, and 343-445 of his Report, states

his conclusions at pages 174-75, 310, and 445-46, and summarizes his recommendations at pages 503-06.

August 1996.

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No. 84, Original

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF ALASKA

ON THE REPORT OF THE SPECIAL MASTER

**BRIEF FOR THE STATE OF ALASKA
IN SUPPORT OF ITS EXCEPTIONS**

INTRODUCTION AND SUMMARY OF ARGUMENT

Alaska owns the lands beneath its inland waters under the equal footing doctrine and offshore submerged lands within three miles of its coast line under the Submerged Lands Act. The United States has exclusive rights to the seabed seaward and outside of Alaska's submerged lands to a distance of at least 200 miles. The issues in this case address Alaska's submerged land ownership along its north coast, and involve both lands beneath inland waters and offshore submerged lands. The Special Master recommends against Alaska in three respects, urging (1) that the 10-mile rule

the Court found was the United States' policy from at least 1903 to 1961, *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 106-07 (1985), not apply to Alaska because the Court erred in that case, (2) that the feature known as Dinkum Sands be deemed not an island and thus not part of Alaska's coast line because the accepted definition of an island contains an "implicit modifier" that precludes island status for Dinkum Sands, and (3) that Congress in the Alaska Statehood Act tacitly intended to defeat Alaska's equal footing doctrine rights to the submerged lands within the National Petroleum Reserve-Alaska ("NPRA"). Alaska excepts to these three recommendations.

This Court more than 150 years ago established that lands underlying navigable waters within State boundaries belong to the States as an inherent attribute of State sovereignty. The original thirteen States succeeded to the British Crown's sovereign title to such lands following the Revolution. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). Title to such lands must vest in subsequently admitted States to ensure that they join the Union on an "equal footing" with the original thirteen. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1845). "The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively." *Id.* at 230. "Thus under *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself." *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

Despite the long-standing rule of State ownership, the United States challenged California's title to offshore submerged lands shortly after World War II. The Court held that the equal footing doctrine applied only to lands underlying inland navigable waters and that the United States had "paramount rights" to offshore submerged lands, *United*

States v. California, 332 U.S. 19, 38-39 (1947), despite prior cases indicating that States own all lands underlying navigable waters within their boundaries, including those offshore. *Id.* at 36.

Believing the 1947 *California* decision had improperly divested the States of title to submerged lands, *United States v. Louisiana ("Louisiana")*, 363 U.S. 1, 16-20 (1960), Congress enacted the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1988), to restore offshore submerged lands to the States. See *United States v. California*, 436 U.S. 32, 37 (1978). The Act also confirmed State title to lands underlying inland navigable waters because of concern that the 1947 *California* decision might apply to title to those lands as well. See, e.g., S. Rep. No. 133, 83d Cong., 1st Sess. 6-7, 62-63 (1953), reprinted in 2 1953 U.S. Code Cong. & Admin. News 1474. In the Act, Congress "recognized, confirmed, established, and vested" in the States the title to lands beneath navigable waters within their boundaries. 43 U.S.C. § 1311(a). The Act defines "boundaries" as the seaward boundaries of a State as they existed at statehood or as later confirmed by the Congress, but extending from the "coast line" no more than three miles into the Atlantic or the Pacific or more than three marine leagues into the Gulf of Mexico. 43 U.S.C. § 1301(b). "Coast line" includes the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c).

Despite enactment of the Submerged Lands Act, few disputes between States and the United States have occupied as much of the Court's docket as those involving submerged lands. These cases are fundamentally important to the States. Title to lands beneath inland waters vests in the States as a direct consequence of admission to the Union on an equal footing with all other States. A State's seaward boundaries define its offshore submerged lands, and State

control over offshore resources is key to a coastal State's economy and quality of life. In contrast, the United States' proprietary interest offshore dwarfs the States'¹ (see, e.g., Alaska Exhibit ("Ak. Ex.") 84A-015, reproduced opposite) even though it does not have the same intimate and direct connection with near-shore resources as coastal States.

This dispute arose in the mid-1970s. Alaska and the United States each claimed ownership of submerged lands in Stefansson Sound, "an extensive lagoon"² on Alaska's north coast enclosed by a fringe of near-shore islands less than ten miles apart. Alaska considered the Sound inland waters whose submerged lands vested in the State at statehood under the equal footing doctrine. Its coast line for Submerged Lands Act purposes thus should include the seaward shores of the islands and straight lines connecting them. Alaska's contention as to its submerged lands ownership in the vicinity of Stefansson Sound is shown on Figure 3.4 of the Report (facing 28).

The United States claimed that Stefansson Sound is not inland waters, that Alaska owns only those submerged lands granted by the Submerged Lands Act, and that this grant must be determined by strictly applying the "arcs-of-cir-

¹In 1945, the United States was the first nation to claim the entire continental shelf off its shores. Proclamation No. 2667, 59 Stat. 884 (1945). Justice Black thus found it "difficult to understand why the Federal Government is subjecting the State of Louisiana and this Court to a long series of technical and wasteful lawsuits" because, once concluded, "the United States will have little more undersea land than it already had." *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 78 n. 2 (1969) (Black, J., dissenting). The United States now claims resource jurisdiction over a 200-mile Exclusive Economic Zone ("EEZ"). Proclamation No. 5030, 3 C.F.R. 22 (1983), reprinted in 16 U.S.C. § 1453 (1985).

²*United States Coast Pilot, Pacific and Arctic Coasts Alaska: Cape Spencer to Beaufort Sea ("Coast Pilot")* 345 (9th Ed., 1979) (Ak. Ex. 136 at the 1980 hearing).

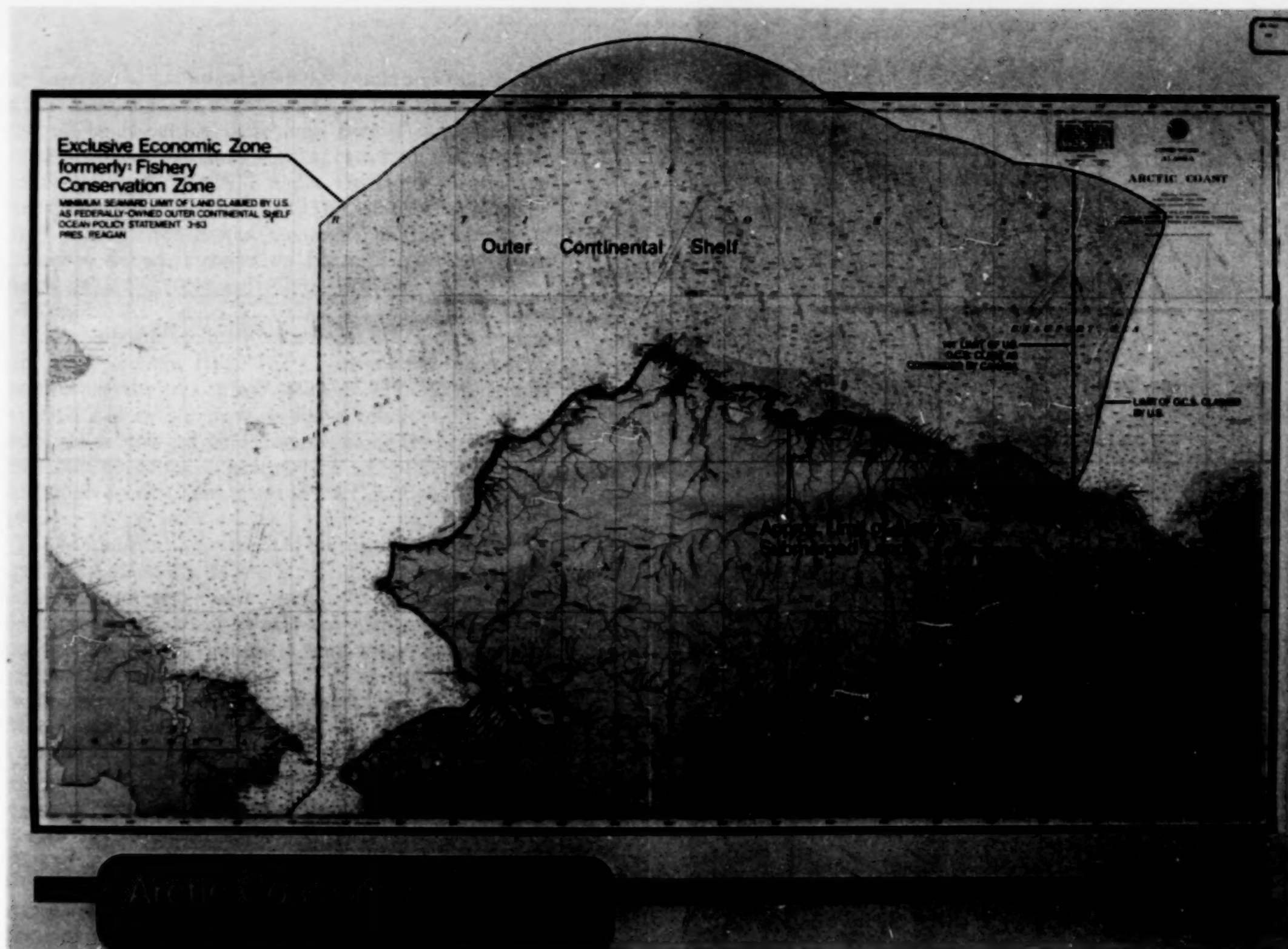


Figure 1. Chart of Alaska's north coast, AK 84A-015, showing the United States' EEZ in pink, Alaska's Submerged Lands Act grant in purple, and the disputed lands in Stefansson Sound in amber and green.

cles" method — *i.e.*, by swinging three-mile arcs from points on the mainland and each island.³ In the United States' view, all lands outside those arcs, even if surrounded by submerged lands owned by Alaska, constitute federal outer continental shelf ("OCS") under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1988 & Supp. V 1993). The United States' contention in the vicinity of Stefansson Sound is shown on Figure 3.2 of the Report (facing 24).

To resolve the dispute, the United States moved for leave to file a complaint against Alaska under the Court's original jurisdiction in May, 1979. The Court granted the motion and directed Alaska to answer. 442 U.S. 937 (1979). Alaska answered and sought leave to file a counterclaim raising additional submerged land disputes along its north coast. The Court appointed J. Keith Mann as Special Master to conduct proceedings and report to the Court. 444 U.S. 1065 (1980).

The Master has now submitted his report (the "Report"). Alaska excepts to the Master's recommendations that (1) Alaska's submerged land ownership in Stefansson Sound and other areas enclosed by near-shore fringing islands less than ten miles apart is limited to lands within three miles of the mainland and each island; (2) Dinkum Sands, one of the islands enclosing Stefansson Sound, is not an island; and (3) submerged lands within NPRA did not pass to Alaska at statehood.⁴

³1 Aaron L. Shalowitz, *Shore and Sea Boundaries* ("1 Shalowitz") 171 (U.S. Dept. of Commerce Pub. 10-1, 1962). Strict application of the arcs-of-circles method is illustrated in Figure 3.1 of the Report (at 23).

⁴Alaska does not except to the Master's recommended finding that lands underlying coastal lagoons were included in the pre-statehood application for the Alaska National Wildlife Refuge ("ANWR"). See Report at 477-99. The Master concludes that title to these lands passed to Alaska at statehood because ANWR was not established until after

A penchant for making things more difficult than necessary runs through the Report. The issues on which Alaska excepts to the Master's recommendations, however, are easily resolved. Shortly before trial on the Stefansson Sound issue, the Court found in a related case that from at least 1903 until 1961 the United States had claimed as inland waters areas that, like Stefansson Sound, are enclosed by islands less than ten miles apart. *Alabama and Mississippi Boundary Case*, 470 U.S. at 106-07. The Master, however, reconsiders the Court's 1985 finding and, despite considerable evidence supporting it, concludes that the Court was wrong. On Dinkum Sands, the evidence shows that it was first surveyed as an island, has often been seen above high water since then, but on occasion submerges. Instead of recommending that it be considered an island as are similar features under both the common law and international law, he rewrites the internationally accepted definition of island by adding an implicit modifier that is virtually the same as one its drafters deliberately rejected. As to NPRA, a pre-statehood federal reservation can defeat a State's entitlement to submerged lands only if Congress clearly intended to include submerged lands within the reservation and affirmatively intended to defeat a new State's title to those lands. *Utah Division of State Lands v. United States ("Utah")*, 482 U.S. 193, 202 (1987). The Master finds both requirements met on the basis of speculative inferences and not direct evidence, an approach contrary to the strong presumption of State ownership established in *Utah* and earlier cases.

Alaska's admission. See Report at 447-77. The Court has indicated that subsidiary matters "need not be dealt with separately, as they are merged in the ultimate question whether . . . the master's finding as to the [ultimate question presented] is correct." *New Mexico v. Texas*, 275 U.S. 279, 286 (1928), *modified as to other issues*, 276 U.S. 557 (1928). Alaska will address the ANWR issues only if the United States excepts to the Master's recommendation on the title issue.

The Court should hold that Stefansson Sound is inland waters under the 10-mile rule and Alaska's Submerged Lands Act grant must be measured from the seaward shore of the islands that enclose it and straight lines connecting them, that Dinkum Sands is an island, and that title to the submerged lands within the exterior boundaries of NPRA passed to Alaska at statehood.

ARGUMENT

- I. **Stefansson Sound and other areas enclosed by near-shore fringing islands less than ten miles apart are inland waters under the 10-mile rule this Court in 1985 found was the United States' policy from 1903 to 1961, and Alaska owns the lands underlying them.**

The question here is whether near-shore fringing islands less than ten miles apart enclose inland waters for, "[i]n the areas actually in dispute, the distances between islands are in fact all less than ten miles." Report at 26. This narrow question seemed resolved when, shortly before the 1985 trial on this issue, the Court found that the United States had claimed areas enclosed by islands less than ten miles apart as inland waters from at least 1903 to 1961:

Prior to its ratification of the Convention [on the Territorial Sea and Contiguous Zone, discussed below] on March 24, 1961, the United States had adopted a policy of enclosing as inland waters those areas between the mainland and off-lying islands that were so closely grouped that no entrance exceeded 10 geographical miles. This 10-mile rule represented the publicly stated policy of the United States at least since the time of the Alaska Boundary Arbitration in 1903.

Alabama and Mississippi Boundary Case, 470 U.S. at 106-07 (footnotes omitted).

The Master nonetheless reconsiders and rejects the Court's 1985 finding as "plainly" unsupported by the evidence. Report at 127.

A. The United States should be precluded from relitigating the Court's finding that the 10-mile rule was the United States' policy.

The Master reconsiders the Court's 10-mile rule finding because "Alaska does not seek to invoke collateral estoppel against the United States." Report at 53-54. Alaska, however, did not waive the point, and the United States should be precluded from relitigating the Court's 1985 finding that the 10-mile rule was the United States' official policy from 1903 to 1961.

In *United States v. Mendoza*, 464 U.S. 154, 163 (1984), the Court held that the United States was not estopped from relitigating an issue that it had lost in the district court but had not appealed because estopping the United States would (1) deprive the Court of the benefit of having several courts consider an issue before certiorari is granted, (2) require the Solicitor General to revise the policy for determining when to appeal adverse trial court decisions, and (3) preclude subsequent administrations from taking a different position with respect to the particular issue in terms of pursuing or not pursuing an appeal. *Id.* at 160-61.

As Alaska pointed out to the Master, Transcript ("Tr.") 3523-34 and Alaska's Reply Brief on Questions 2, 3, 4, 12, 13, and 15 ("ARB"), Appendix A at 35, those policy considerations do not apply where the United States' interest in this case is identical to its interest in the contemporaneous *Alabama and Mississippi Boundary Case*, and both cases are under the Court's original jurisdiction. Estoppel remains appropriate to preclude the United States from relitigating the Court's 1985 finding.

B. The evidence supports the Court's 1985 finding that the 10-mile rule was the United States' policy from at least 1903 to 1961.

In any event, the evidence fully supports the Court's 1985 finding. Three examples illustrate the point. First, at the 1903 Alaska Boundary Arbitration, "the United States explicitly stated that the waters inside the islands were inland waters *because* none of the ocean entrances exceeded ten miles in width." *Alaska Boundary Controversy* 1 (1952), a Justice Department study prepared for use in litigation against California, *excerpted in* Ak. Ex. 85-099 (emphasis in original). Second, in 1951 the United States followed the 10-mile rule to draw the seaward limits of inland waters along the Louisiana coast: "[T]he principle followed in drawing the baseline was that waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were considered inland waters." 1 Shalowitz, *supra* note 3, at 161,⁵ cited in support of the Court's 10-mile rule finding in the *Alabama and Mississippi Boundary Case*, 470 U.S. at 106 n. 9. Finally, in 1961 Solicitor General Cox found that both prior United States' practice and the Convention on the Territorial Sea and Contiguous Zone, ratified by the United States in 1961, 15 U.S.T. (pt. 2) 1607, T.I.A.S. N. 5639 ("the Convention") sanctioned the 10-mile rule, which he stated as: "Waters enclosed between the mainland and off-lying islands which are so closely grouped that no entrance exceeds ten miles in width shall be considered inland waters." See Ak. Ex. 85-145 and -159 at 1-3. Shalowitz concurred. Ak. Ex. 85-150 at 4. The Court has since incorporated the Convention into the Submerged

⁵Shalowitz was a technical adviser to the Justice Department in Submerged Lands Act cases, 1 Shalowitz, *supra* note 3, at viii, and is perhaps the foremost commentator relied on by the Court in these cases.

Lands Act. *United States v. California* ("California"), 381 U.S. 139, 165 (1965).

These examples of the United States' policy reflect the balance of the evidence, as discussed in subsection 3 below. Under the Court's prior rulings, the 10-mile rule controls resolution of this issue.

1. The United States' maritime delimitation policy when Alaska became a State controls resolution of these questions.

For Submerged Lands Act purposes, Alaska's boundaries became effective when it joined the Union in 1959. They thus were fixed by the United States' policy in 1959 of enclosing as inland waters areas between the mainland and fringing islands less than ten miles apart. Using the current United States' policy of strictly applying the arcs-of-circles method would impermissibly contract Alaska's territory.

Articles 4 and 5 of the Convention authorize, but do not require, the use of "straight baselines" connecting offshore islands to delimit inland waters. The Court held in the 1965 *California* case that California could not use straight baselines to claim the areas between the mainland and remote islands as much as 56 miles off its coast (*see* 381 U.S. at 143 n. 4) if that would extend the United States' international boundaries over the United States' objection. *Id.* at 168. It cautioned, however, that the United States' responsibility for foreign relations must be "accommodated" with the States' territorial interests, and "a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable." *Id.* (emphasis added).

In the *Louisiana Boundary Case*, 394 U.S. at 73-74 n. 97 (1969), the Court warned that if the United States historically had used a straight baseline approach it could not change that policy merely to gain an advantage over the States in Submerged Lands Act cases. The United States

earlier had conceded that Chandeleur and Breton Sounds, enclosed by an island fringe like that enclosing Stefansson Sound, were inland waters, *id.* at 66-67 n. 87, and "to permit the National Government to distort [the Convention's] principles, in the name of its power over foreign relations" would be "inequitable." *Id.* at 77. Allowing it "to prevent recognition of a historic title which may already have ripened because of past events . . . would approach an *impermissible contraction* of territory against which [the Court] cautioned in [the 1965] *California* case." *Id.* at n. 104 (emphasis added).

The Master acknowledges that the United States has enclosed waters behind islands as inland waters "on some occasions," Report at 130-31, and that he must "consider how the United States' pre-Convention policy for waters inside near-shore barrier islands would have applied in Alaska." *Id.* at 136-37. He denies, however, that Alaska's Submerged Lands Act grant was fixed at statehood because the Court rejected the United States' similar argument in the 1965 *California* case. *Id.* at 50. The Court's rejection of the United States' argument in that case, however, did not cause a *contraction* of a State's recognized territory, and does not support the Master's conclusion that Alaska's Submerged Lands Act rights can be determined as of some time other than the date of statehood.

The prohibition against an impermissible contraction requires that State boundaries be fixed at *some* point. As applied to Alaska, the Submerged Lands Act defines "boundaries" as those in effect at statehood. 43 U.S.C. § 1301(b). "[T]he boundaries contemplated by the Submerged Lands Act are those fixed by virtue of Congressional power to admit new States and to define the extent of their territory." *Louisiana*, 363 U.S. at 51 (1960).

Congress exercised that power by defining Alaska's boundaries in terms of the United States' maritime delimitation policy in 1959. Both the Alaska Constitution and the

Alaska Statehood Act define Alaska to include "appurtenant territorial waters" at statehood.⁶

The Master suggests that, unlike every other State, Alaska's Submerged Lands Act grant may not be co-extensive with those boundaries. In his view, Congress "took special care to distinguish between the location of the boundary and the question of title to submerged lands inside the boundary." Report at 35 n. 9. The Master is simply wrong. Senator Cordon proposed what became the description of Alaska in section 2 of the Statehood Act at a 1954 committee hearing during the Second Session of the 83d Congress, see *Alaska Statehood: Hearings on S. 50 before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 2d Sess. 222 (1954) ("*Senate Hearings*"), the same Congress that enacted the Submerged Lands Act. Senator Cordon was the manager of the bill that became the Submerged Lands Act. *California*, 381 U.S. at 151. He intended that Alaska's boundary be co-extensive with "the three mile limit that this country has contended for always." *Senate Hearings* at 223. Senator Jackson asked him whether this would convey "everything there is up there, as far as the overall boundary lines are concerned, to the new State," and Senator Cordon assured him that it would. *Id.* at 282. The next year, Alaska's Delegate Bartlett explained to a House Committee that the Senate had used the phrase "together with the territorial waters appurtenant thereto" because "it would be more descriptive in respect to the Submerged Lands Act" and "tied in better with the Submerged Lands

⁶Article XII, § 1 of the Alaska Constitution provides in part that Alaska consists of the Territory of Alaska "together with the territorial waters appurtenant thereto." Congress "accepted, ratified, and confirmed" the Alaska Constitution in § 1 of the Alaska Statehood Act, and section 2 states that Alaska consists of the Territory of Alaska "including the territorial waters appurtenant thereto." Pub. L. No. 85-508, 72 Stat. 339 (1958), reprinted as amended in 48 U.S.C. note preceding § 21 (1987).

Act." *Hawaii-Alaska Statehood: Hearings on H.R. 2535, H.R. 2536, and Related Bills before the House Comm. on Interior and Insular Affairs*, 84th Cong., 1st Sess. 114 (1955).

Congress applied the Submerged Lands Act to Alaska in section 6(m) of the Alaska Statehood Act, which also provides that Alaska "shall have the same rights as do existing States thereunder." Congress, in considering statehood for Alaska, recognized that the Submerged Lands Act "confirms to the existing States title to their tidelands and submerged lands out to their historic boundaries." S. Rep. No. 1028, 83d Cong., 2d Sess. 33 (1954). A different rule for Alaska as the Master suggests would contravene section 6(m)'s requirement that Alaska have the same Submerged Lands Act rights as other States.

State boundaries which cannot be unilaterally contracted by the United States are determined, like Alaska's, by the action taken jointly by Congress and the State "to fix the States' boundaries against subsequent change without their consent." *Louisiana*, 363 U.S. at 28-29. In terms of *impermissible contraction*, both Alaska's equal footing doctrine lands and its Submerged Lands Act grant were fixed at statehood.

2. The Master overlooked well-established principles governing consideration of the evidence of the United States' policy.

The Master assigned to Alaska the burden of proving that the Court's 1985 10-mile rule finding was correct. Report at 52. Whether that assignment was proper or not,⁷ the

⁷In making this assignment the Master cites decisions in which the Court has shown deference to the position taken by the United States. Report at 51-52. Since the Court has already made the finding regarding the 10-mile rule, such deference seems particularly inappropriate here. One commentator has argued persuasively that such deference to the United States' position, afforded because of a perceived connection to

Master's conclusion that Alaska did not meet the burden ignores a number of well-established principles governing consideration of the evidence of the United States' policy. For example, he affords undue significance to minor variations in the way the United States expressed its otherwise consistent policy over time, ignoring the principle that minor uncertainties and even contradictions in a nation's practice are legally insignificant. As the International Court of Justice noted with respect to Norway's historic maritime delimitation practice,

too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice. They may easily be understood in the light of the variety of the facts and conditions prevailing in the long period of time which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.

Fisheries Case (U.K. v. Norway), 1951 I.C.J. 116, 138 (emphasis added).

foreign relations, "should play no role in these cases." Jonathan I. Charney, *Judicial Deference in the Submerged Lands Cases*, 7 Vand. J. Transnat'l L. 383, 454 (1974). Professor Charney is uniquely qualified to make such an observation. Prior to his academic appointment, the Justice Department hired him "specifically" to handle Submerged Lands Act litigation. He served as Chief of the Marine Resources Section and was either a trial attorney or supervisor in proceedings before Special Masters in the *Louisiana* (No. 9, Original) and *Maine* (No. 35, Original) cases and lower court proceedings leading to *United States v. Alaska*, 422 U.S. 184 (1975). Tr. 3029-30. He was a member of the United States Public Advisory Committee on the Law of the Sea, participating in law of the sea negotiations and related matters, and served as a consultant to the State Department on litigation before the International Court of Justice. *Id.* at 3034. The Master accepted Professor Charney as "an expert in international law and law of the sea, with particular expertise in those two areas as they relate to United States foreign policy and interests." *Id.* at 3037.

A policy different from long-established practice must be shown by "convincing evidence to the contrary":

In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose.

Id. (emphasis added).

The Master also failed to follow the more general rule that a litigant does not have the burden "of establishing facts peculiarly within the knowledge of his adversary." *United States v. New York, New Haven & Hartford Railroad*, 355 U.S. 253, 256 n. 5 (1957). "[A]ll evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." *Mammoth Oil Co. v. United States*, 275 U.S. 13, 51 (1927) (citation omitted). The evidence of the United States' maritime delimitation policy necessarily comes primarily from official government documents in its exclusive possession.

Further, "[t]he production of weak evidence when strong is available can only lead to the conclusion that the strong would have been adverse." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (citations omitted). "Silence then becomes evidence of the most convincing character." *Id.* (citations omitted). The United States produced only weak evidence to contradict the Court's 10-mile rule finding, and produced no evidence showing that it strictly applied the arcs-of-circles method to fringes of near-shore barrier islands less than ten miles apart prior to the 1971 publication of maps disclaiming the inland waters status of areas like Mississippi Sound, see *Alabama and Mississippi Boundary Case*, 470 U.S. at 111, and Stefansson Sound. Indeed, the federal executive explicitly rejected strict appli-

cation of the arcs-of-circles method in international relations in 1930 and Congress rejected it in the 1953 Submerged Lands Act. These facts are "evidence of the most convincing character" *Interstate Circuit*, 306 U.S. at 206, that the arcs-of-circles method was not the United States' policy at the time of Alaska's admission.

The United States, moreover, presented no evidence of a foreign relations rationale for changing its policy from the 10-mile rule to strict application of the arcs-of-circles method in 1971. As discussed below, its desire to prevail in domestic Submerged Lands Act cases was the only reason for the change.

Under the principles established by both this Court and the International Court of Justice, the minor variations in phraseology and application that the Master discusses are legally insignificant. They do not controvert the Court's 1985 finding that the 10-mile rule was the United States' consistent policy from at least 1903 until 1961, much less show that the United States would have applied its current policy of strictly applying the arcs-of-circles method to Alaska's north coast in 1959. The evidence establishes, moreover, that determining Alaska's Submerged Lands Act grant under the arcs-of-circles method would impermissibly contract Alaska's recognized territory, a result this Court condemned in both the 1965 *California* decision and the *Louisiana Boundary Case*.

3. The evidence shows that the Court was correct: The 10-mile rule was the United States' policy from at least 1903 to 1961.⁸

As late as 1964, the United States told the Court that its pre-Convention policy was to treat areas enclosed by near-

⁸Because of space limitations, Alaska cannot address every point the Master makes in his discussion of the United States' historical policy. We do, however, point out the considerable evidence supporting the

shore fringing islands less than ten miles apart as straits leading to inland waters unless they "served as a passageway between two areas of high seas," in which case they would be territorial waters subject to the right of innocent passage:⁹

Court's 1985 10-mile-rule finding and show that the Master's criticisms of that evidence do not controvert that finding.

⁹In the *Louisiana Boundary Case*, the Court defined "inland [or internal] waters," "territorial sea," and "high seas," three terms that appear frequently in the evidence of the United States' maritime delimitation policy:

Under generally accepted principles of international law, the navigable sea is divided into three zones, distinguished by the nature of the control which the contiguous nation can exercise over them. Nearest to the nation's shores are its inland, or internal waters. These are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial, sea. Within it the coastal nation may exercise extensive control but cannot deny the right of innocent passage to foreign nations. Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.

394 U.S. at 22-23 (footnotes omitted). A fourth term — "territorial waters," also used in the Alaska Statehood Act to describe the new State — includes both inland waters and the territorial sea. See 1 Shalowitz, *supra* note 3, at 23; Memorandum of the United States in Response to Request of Special Master of June 29, 1949, (August 1949) (Ak. Ex. 85-063) at 7, *United States v. California*, (No. 11 (now No. 5), Original) (Oct. Term, 1949). Employing these terms, Alaska's submerged lands are those underlying territorial waters — i.e., inland or internal waters and the marginal or territorial sea — while the federal OCS underlies high seas. As used throughout the evidence of United States policy discussed herein, the "territorial sea" or "territorial waters" of the United States extended three miles offshore. In 1988 the United States extended its territorial sea to 12 miles offshore, a change in the United States' international policy that has no legal effect on the issues in this case. Report at 18 n. 3.

(e) *Straits leading to inland waters* — Wherever the United States has insisted on the right of innocent passage through straits, denying them the status of inland waters, *the claim has rested on the character of the strait as a passageway between two areas of high seas. No such right is claimed as to a strait leading only to inland waters.* Such a strait is treated as a bay. Examples of this have already been discussed, including the straits leading into the Alaskan Archipelago, straits leading to waters between Cuba and its encircling reefs and keys, and Chandeleur Sound.

Brief for the United States in Answer to California's Exceptions to the Report of the Special Master ("United States 1964 Brief") (June 1964), (Ak. Ex. 85-016) at 130-31, *United States v. California*, (No. 5, Original) (Oct. Term, 1963) (footnote and citations omitted) (emphasis added). Thus, according to the United States, the key determinant for inland waters status was whether the United States insisted on a right of innocent passage.

This simple, functional distinction between inland waters and territorial sea reconciled two sometimes competing national interests. The United States has both a "maritime interest" in freedom of navigation in other countries' waters and a "coastal interest" in maintaining exclusive jurisdiction over its own. Tr. 3039-40 (testimony by Professor Charney). Preserving a right of innocent passage where required for international navigation while claiming plenary jurisdiction where innocent passage is not necessary accommodates both interests. The United States employed this approach until 1971.

The evidence shows that the United States held this position for more than 150 years prior to Alaska's admission, held it in 1959 when Alaska was admitted to the Union and its submerged lands title vested, held it in 1965 when the United States submitted its first brief to this Court following the Court's adoption of the Convention for purposes of the

Submerged Lands Act, and publicly renounced it only with the 1971 publication of the charts noted by the Court in the *Alabama and Mississippi Boundary Case*, 470 U.S. at 111. The 1971 renunciation constituted what the Court warned against in both the 1965 *California* and the 1969 *Louisiana* cases, an impermissible attempt to contract the States' — including Alaska's — recognized territory in the name of foreign policy. *California*, 381 U.S. at 168; *Louisiana Boundary Case*, 394 U.S. at 77 n. 104. As the Court there quoted its Master, Walter F. Armstrong, "[I]t is difficult to accept the [renunciation] as entirely extrajudicial in its motivation." 470 U.S. at 112 (citations omitted).

a. The United States articulated the 10-mile rule as its policy at the 1903 Alaska Boundary Arbitration.

The 1903 Alaska Boundary Arbitration crystallized the preceding century of the United States' maritime delimitation policy¹⁰ in an explicit 10-mile rule for inland waters enclosed by islands. The Arbitration determined the baseline for measuring the 10-league-wide "panhandle" of Southeast Alaska, a strip ("*lisière*") of mainland constituting part of Alaska under an 1825 treaty between Russia and Great Britain. See Report at 61-64. Under the treaty, the *lisière* was to be measured from the "windings of the coast." *Id.* at 62 n. 22. The United States favored the physical shoreline of the mainland, including all of its sinuosities; Great Britain argued for the mainland shore but with straight lines across the mouths of inlets. *Id.* at 63. The United States' Agent, Hannis Taylor, emphasized the difference between the political coast line from which a nation's

¹⁰The Master discusses only three examples of the United States' maritime delimitation policy leading up to the 1903 Alaska Boundary Arbitration. Report at 56-61. Appendix A summarizes additional Pre-1903 evidence that the United States claimed enclosed areas as inland waters and traces the evolution of the 10-mile distance criterion.

maritime jurisdiction is measured and the physical coast line from which the 10-league *lisière* should be measured:

[T]here are but two possible coast lines known to international law. One is the physical coast line traced by the hand of nature, where the salt water touches the land, which exists for the purpose of boundary: the second is the political coast line — that invisible thing superimposed upon the physical coast by the operation of law, which exists for the purpose of jurisdiction.

Argument of Hannis Taylor, *Proceedings of the Alaskan Boundary Tribunal*, S. Doc. No. 162, 58th Cong., 2d Sess. (1903-04) at 605 (Ak. Ex. 85-018). He explained that the political coast line ran along the outer edge of the Alexander Archipelago and that straight lines less than ten miles long across the water entrances between the islands enclosed inland waters:

[The political coast line] is an imaginary line which the law superimposes upon the physical coast line as a basis. But for the purposes of international law, instead of following all the convolutions and sinuosities of the coast, it is permitted to go across the heads of bays and inlets, and it is in that particular that the rule of international law comes in as to the width of bays and inlets, either 6 or 10 miles. We are not encumbered with that question, because the British Case contends that they must be 10 miles, and we do not dispute it, and these outside inlets are 10 miles.

....

The minute you fix it, all waters back of it, whether they are waters of the Archipelago there of Alexander or the Archipiélago de Los Canarios, of Cuba, they all became, as Hall says, salt-water lakes: they are just as

much interior waters as the interior waters of Loch Lomond

Id. at 611.

The key fact was that the islands were less than ten miles apart: "[T]he United States explicitly stated that the waters inside the islands were inland waters *because* none of the ocean entrances exceeded ten miles in width." *Alaska Boundary Controversy* 1 (1952), a Justice Department study prepared for use in the *California* litigation, in Ak. Ex. 85-099 (emphasis in original). The United States claimed that the Alexander Archipelago was inland waters as late as 1964, *see* United States 1964 Brief, *supra* page 18, at 131 (Ak. Ex. 85-016), and first disclaimed inland waters status for the Alexander Archipelago in 1971. Report at 166-67.

b. The Court recognized that islands enclose inland waters shortly after the Alaska Boundary Arbitration.

Shortly after the Alaska Boundary Arbitration, this Court, in *Louisiana v. Mississippi*, 202 U.S. 1 (1906), determined the boundary between those two States in Lake Borgne and Mississippi Sound. The Court's analysis reflected the principle that areas enclosed by islands are inland waters and not open sea, consistent with the United States' position at the Alaska Boundary Arbitration. The Court described Mississippi Sound as "an enclosed arm of the sea" formed by a chain of fringing islands. *Id.* at 48. The Court held that the States' common boundary in Mississippi Sound should be determined under the "thalweg" doctrine that applies only to inland waters. As explained in the *Alabama and Mississippi Boundary Case*,

[u]nder that doctrine, the water boundary between States is defined as the middle of the deepest or most navigable channel, as distinguished from the geographic center or a line midway between the banks.

The Court concluded that the "principle of thalweg is applicable," not only to navigable rivers, but also to "sounds, bays, straits, gulfs, estuaries and other arms of the sea." The Court rejected the contention that the doctrine did not apply in Lake Borgne and Mississippi Sound because those bodies were "open sea." The Court noted that the record showed that Lake Borgne and the relevant part of Mississippi Sound are not open sea but "a very shallow arm of the sea, having outside of the deep water channel an inconsiderable depth." The Court clearly treated Mississippi Sound as inland waters, under the category of "bays wholly within [the Nation's] territory not exceeding two marine leagues in width at the mouth."

470 U.S. at 108 (citations omitted).

The case was significant because it put foreign nations on notice that the United States claimed Mississippi Sound as inland waters, *id.*, just as the Alaska Boundary Arbitration gave notice that the United States claimed the Alexander Archipelago as inland waters. It also alerted foreign nations that the same inland water rule applied to other "sounds, bays, straits, gulfs, estuaries and other arms of the sea." *Id.*

c. Two events in 1929 are consistent with the 10-mile rule.

Two events in 1929 leave the Master "in some doubt as to whether a ten-mile rule for islands, as of 1929, was quite so well established" as the Court found in 1985. Report at 70. The first is a July 13, 1929 letter from the State Department to Norway that is entirely consistent with the 10-mile rule. It did not describe the United States' maritime delimitation policy, saying only that "precise lines [delimiting inland waters] had not been established." Report at 68 n. 28. (The 1971 charts noted by the Court in the *Alabama and Mississippi Boundary Case*, 470 U.S. at 111, apparently were the

first time the United States publicly established such lines.) The letter did not disavow, contradict, or repudiate the 10-mile rule, and thus did not signal a policy change. *Cf. Fisheries Case*, 1951 I.C.J. at 138 ("convincing evidence to the contrary" is required to show a change in prior consistent practice).

The second event is the United States' response to a League of Nations' questionnaire in which it said it would not tolerate exclusive claims to the Straits of Magellan by any nation. *See Report* at 70 and n. 30. In pursuit of its maritime interest, however, the United States frequently takes positions with respect to *other countries'* jurisdiction that differ considerably from its position as to its *own*.¹¹ Limitations the United States would impose on other countries' jurisdiction thus provide questionable evidence of its domestic policy.

The few straits used for international navigation like the Straits of Magellan, moreover, differ from the openings between near-shore barrier islands less than ten miles apart that lead only to enclosed areas like Stefansson Sound. The United States' maritime interest calls for a right of innocent passage in the former, but its coastal interest supports inland waters status for the latter. As with the letter to Norway, the United States' response to the League of Nations' questionnaire rejecting exclusive claims to the Straits of Magellan

¹¹ Compare Secretary of State Bayard's June 14, 1886, letter protesting Canadian interference with American fishermen's "unquestionable rights to pursue their business at any point not within three marine miles of the shore," cited in Thomas Baty, *The Three-Mile Limit*, 22 Am. J. Int'l L. 503, 525 (1928) (Ak. Ex. 85-801), with the United States' August 1886 seizure of three British schooners engaged in pelagic sealing 70, 75, and 115 miles from the nearest land. Christopher B.V. Meyer, *Extent of Jurisdiction in Coastal Waters* 305 (1937) (Ak. Ex. 85-804); 2 *Great Britain and the Law of Nations* 369 (Appendix, "The Behring Sea Arbitration, Argument of Her Majesty's Government") (Herbert A. Smith, ed. 1935) (Ak. Ex. 85-034).

does not evidence a change in policy. *Fisheries Case*, 1951 I.C.J. at 138.

- d. **The United States in 1930 preserved the 10-mile rule as a rule for straits leading to inland seas and rejected the arcs-of-circles method for islands less than ten miles apart.**

In 1930, the League of Nations sponsored a Conference for the Codification of International Law at the Hague. The United States proposed a comprehensive delimitation scheme that rejected strict application of the arcs-of-circles method, preserved the 10-mile rule in terms of a rule for straits leading to inland seas, and included a new proposal for assimilating "objectionable pockets" of high seas to the territorial sea.¹²

The United States proposed that the seaward limit of territorial waters be determined by the arcs-of-circles method with arcs swung from the coast of the mainland, individual islands, and the seaward limit of inland waters. Where this produced pockets or enclaves of high seas near islands less than ten miles apart, the pockets or enclaves would be assimilated to the territorial sea, thus simplifying the seaward boundary. See Report at 33, Figure 3.6. A bay would be inland waters if its mouth was less than ten miles wide and it satisfied a formula based on the area of a semi-circle. Where both entrances of a strait connecting two areas of high seas belonged to the same country and were less than six miles wide, the strait would be territorial waters; if an entrance exceeded six miles in width, the territorial sea would extend three miles from each coast.

¹²See 3 Acts of the Conference for the Codification of International Law, Minutes of the Second Committee: Territorial Waters, League of Nations Doc. C.351(b).M.145(b).1930.V (1930) ("Acts of Conference"), excerpted in Ak. Ex. 85-001 and summarized in the Report at 69.

Finally, the 10-mile rule for bays would apply where a strait was merely a "channel of communication with an inland sea." This proposal for straits leading to inland seas is fully consistent with the Court's finding that the 10-mile rule was the United States' policy from at least 1903 to 1961, and was how the United States often expressed the rule from this point on.

The greater significance of the 1930 proposals, however, was that the United States rejected strict application of the arcs-of-circles method. State Department Geographer Boggs explained that strictly applying the arcs-of-circles method produces "objectionable," "anomalous," and "undesirable" pockets and enclaves of high seas that must be eliminated for the same reason that inland waters are enclosed. S. Whittemore Boggs, *Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law*, 24 Am. J. Int'l L. 541, 552-53 (1930) (Ak. Ex. 85-061). Whether inland waters or territorial sea, these pockets and enclaves would be subject to the adjacent nation's jurisdiction and part of its sovereign territory. The only distinction was that there is a right of innocent passage in the territorial sea but not in inland waters. *Louisiana Boundary Case*, 394 U.S. at 22-23. These pockets and enclaves would never be high seas.

The 1930 assimilation and simplification proposal which the Master finds at odds with the 10-mile rule, Report at 71-74, thus was at most one of the legally insignificant "uncertainties or contradictions, real or apparent," not amounting to "convincing evidence to the contrary" showing a change in prior policy. *Fisheries Case*, 1951 I.C.J. at 138. Indeed, the United States never applied assimilation and simplification to its own waters. Ak. Ex. 85-062 at 10 (answer to Interrogatory 10). Thus, while it may have been included in general statements of the United States' policy, it was never actually followed in practice.

e. After 1930, the United States continued to follow the 10-mile rule.

The United States' most significant post-1930 application of the 10-mile rule came in 1950 with the drawing of the Chapman line to delimit the coast line of Louisiana:

[T]he United States followed this [10-mile rule] policy in drawing the Chapman line along the Louisiana coast following the decision in *United States v. Louisiana*, 339 U.S. 699 (1950). See 1 Shalowitz, [supra note 3], at 161.

Alabama and Mississippi Boundary Case, 470 U.S. at 106 n. 9. At the place cited, Shalowitz explained that "the principle followed in drawing the [Chapman line] was that waters enclosed between the mainland and offlying islands which were so closely grouped that no entrance exceeded 10 nautical miles in width were considered inland waters" — i.e., the 10-mile rule. The 10-mile rule was used to draw the Chapman line because it was the United States' policy in its international relations:

[The Chapman Line] represented an effort to apply, as accurately as possible, the principles of delimitation advocated by the United States in the proceedings before the Special Master [in the *California* litigation then pending].^{2/}

^{2/} These principles had been developed in international law or had been promulgated by the United States in its international relations. They involved the semicircular rule and the 10-mile rule for bays, and the rule for straits leading to inland waters Along the Louisiana coast all islands are so situated in relation to the mainland and to each other as to enclose all waters landward of the islands as inland waters The openings between the numerous islands along the Loui-

siana coast constitute channels leading to inland waters and the rule as to bays becomes applicable.

¹ Shalowitz, *supra* note 3, at 108 (citations and footnote 6 omitted).

The Master rejects Shalowitz's explanation, arguing that (1) his book "was written long after the fact," Report at 93, and "was published some twelve years after the Chapman line was drawn," *id.* at 89, (2) an "unqualified" 10-mile rule would conflict with the United States' 1930 proposals, *id.* at 89-93, and (3) the 10-mile rule as described by Shalowitz "is a significant extension to the 1930 statements of the rule" for a strait leading to an inland sea, *id.* at 93. Shalowitz may well have written the passages soon after the fact, however, and the timing of his book's publication does not diminish his explanation. It was "based on personal knowledge of the author who assisted the Department of Justice throughout the pendency of the boundary phases of the submerged lands cases." ¹ Shalowitz, *supra* note 3, at 109 n. 8. The Master's concerns with Shalowitz's explanation of the Chapman line do not provide "convincing evidence to the contrary" overcoming the Court's finding that the 10-mile rule was the United States' policy.¹³ *Fisheries Case*, 1951 I.C.J. at 138.

¹³The Master also suggests that the United States, in designating Chandeleur and Breton Sounds as inland waters, may have relied on an absence of foreign traffic in the Sounds and the fact that islands cover more than half of the line enclosing them. Report at 86-87, citing a July 6, 1950 draft memorandum by State Department Geographer Boggs (Ak. Ex. 85-085). No evidence indicates that the draft memorandum was ever finalized, sent to anyone, or in any way reflected the United States' official policy. More significantly, the draft memorandum did not suggest that these factors were additional criteria for inland waters status. It simply stated that, because of these facts, "it seems apparent that the waters of these two sounds should be regarded as inland waters, and not as territorial sea." Ak. Ex. 85-085 at 1. Were they additional criteria for inland waters status, Boggs surely would have

In the *Fisheries Case*, both Great Britain and Norway interpreted the United States' policy in the same way the Court and Shalowitz did. Norway contended that the United States' system was the same as the Norwegian straight baseline system, a contention the Master incorrectly concludes "was not justified." Report at 95. The 10-mile rule was a system of baselines, all of which were straight — literally, a system of straight baselines — albeit with a 10-mile limitation on the length of lines. The United Kingdom argued that the United States' policy provided no precedent for straight baselines to enclose as inland waters areas that were seaward of any islands, citing the United States' 10-mile limit for bays and straits leading to inland waters at both the Alaska Boundary Arbitration and the 1930 Hague conference. Report at 97. The Master discounts this evidence, maintaining that the United Kingdom did not claim that every opening between islands less than ten miles apart would in the United States' view be a strait leading to

mentioned them in a paper "that grew out of his work on the Louisiana coastline," Report at 88, but he did not. See S. Whittemore Boggs, *Delimitation of Seaward Areas under National Jurisdiction*, 45 Am. J. Int'l L. 240 (1951) (Ak. Ex. 85-96). In this paper, Boggs proposed that the seaward limit of inland waters be determined by swinging reverse arcs from the outer limit of the territorial sea. *Id.* at 254-56. Although more complicated than the 10-mile rule and never cited as representing the United States' official policy, Report at 128 n. 96, that proposal was consistent with the 10-mile rule's premise that areas enclosed by fringing islands less than ten miles apart were inland waters. The Master also interprets Boggs' assimilation of areas in the Alexander Archipelago to "territorial waters" as a significant departure from the United States' position at the 1903 Alaska boundary arbitration where they were considered inland waters. Report at 107. The term "territorial waters," however, includes both territorial sea and inland waters. See note 9 *supra*. Boggs did not separately address inland waters and territorial sea because they both were "territorial waters." Under his procedure for delimiting inland waters by swinging reverse arcs from the seaward limit of the territorial sea, moreover, the Alexander Archipelago would have been inland waters.

inland waters. *Id.* If the United Kingdom believed the United States' practice was to employ the 10-mile rule with respect to island fringes under only limited conditions, however, it would have said so in trying to limit Norway's claim. The United Kingdom's failure to make this argument demonstrates that it viewed the 10-mile rule described by the Court and Shalowitz as the United States' policy.

Secretary of State Webb restated the 10-mile rule for straits leading to inland seas in his November 13, 1951, letter submitted in the *California* litigation (Ak. Ex. 85-094, reprinted as Appendix D in 1 Shalowitz, *supra* note 3, at 354). See Report at 98-103. Webb distinguished between international straits which connect two areas of high seas and straits which are merely channels of communication with inland seas, stating simply that "the rules regarding bays should apply" to the latter. Ak. Ex. 85-094 at 3-4, 1 Shalowitz, *supra* note 3, at 356. As noted above, the rule for straits leading to inland seas is the only provision that the United States applied to its own waters enclosed by fringing islands less than ten miles apart.¹⁴

Again, all of this evidence is consistent with the Court's 1985 finding that the 10-mile rule was the United States' policy from at least 1903 to 1961. Nothing provides the "convincing evidence to the contrary" required to contravene that finding. *Fisheries Case*, 1951 I.C.J. at 138.

¹⁴This explains Webb's omission from the letter of assimilation and simplification. The United States never applied assimilation and simplification to its own waters. Ak. Ex. 85-062 at 10 (answer to Interrogatory 30). Instead, it consistently employed the 10-mile rule in terms of straits leading to inland seas, as it did in drawing the Chapman line along the Louisiana coast. As the Master notes, "it would have seemed inconsistent with the Chapman line to represent assimilation as the general policy." Report at 101 n. 75. This also answers the Master's concerns, *id.* at 104-05, regarding Special Master Davis's findings as to the United States' policy in his report in the *California* litigation.

f. Congress in 1953 rejected the arcs-of-circles method in the Submerged Lands Act.

The Submerged Lands Act defines the coast line from which the States' grant is measured as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." 43 U.S.C. § 1301(c). In the Senate floor debate on the Act, Senator Douglas moved to amend the definition to provide that coast line would be defined as "the line of ordinary low water along that portion of the coast of the main continent which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and in the case of any island seaward of such coast, means the line of ordinary low water around such island." 99 Cong. Rec. 4240 (1953) (proposed new language emphasized). He feared that the current definition of "coast line" would permit States to make expansive claims where they have islands a substantial distance from the mainland — i.e., "remote islands" such as those off California. *Id.*; see also *California*, 381 U.S. at 158 n. 23.

While Congress did not contemplate remote islands giving States a claim to all of the water areas between the mainland and the islands, it was concerned that the amendment would require strict application of the arcs-of-circles method to all islands, including those like the near-shore fringing islands enclosing Chandeleur Sound. "The effect of the Douglas amendment would be to make Chandeleur Sound a part of the high seas, although the Federal Government has never contended that Chandeleur Sound was part of the high seas, and the State government has always claimed it was inland waters." 99 Cong. Rec. 4242 (1953) (comments of Senator Long). "We would have to apply this amendment instead of the present rule of inland waters which permits both the Nation and the State to measure from the outer line along those islands." *Id.* at 4242 (comments of Senator Daniel). Senator Holland explained that

the "coast which is in direct contact with the open sea" in the definition refers to the seaward shore of the islands:

The point I am making now is that under the definition in the joint resolution [now in the Act] . . . there would be no question about the outer rim of the Chandeleur Islands being that portion of the coast which is in contact with the open sea — which would be the open Gulf of Mexico in that case — and that that line, when joined to other segments which mark the seaward limits of inland waters, and other portions of the coast in contact with the open gulf, would make a contiguous co-extensive line extending all the way along the gulf frontage of Louisiana. There would be a failure to accomplish that result under the amendment of the Senator from Illinois. So I hope the amendment of the Senator from Illinois will be rejected.

99 Cong. Rec. 4242 (comments of Senator Holland).

Senator Douglas's amendment, his colleagues believed, would have made the *landward* shore of near-shore barrier islands part of the coast line for Submerged Lands Act purposes. The Senate avoided that result by defeating Senator Douglas's amendment on a vote of 50 to 26. *Id.* at 4243.

Another provision of the Submerged Lands Act furnishes additional evidence of Congress's intent that the States would receive title to submerged lands between the mainland and near-shore barrier islands. Nothing in the Act is to affect the United States' rights to "that portion of the subsoil and seabed of the Continental Shelf *lying seaward and outside of*" the lands granted to the States under the Act. 43 U.S.C. § 1302 (emphasis added). The Outer Continental Shelf Lands Act similarly defines the federal OCS as "all submerged lands lying *seaward and outside of* the area of lands beneath navigable waters as defined in [the Submerged Lands Act]." 43 U.S.C. § 1331(a) (emphasis added). Enclaves and pockets of submerged lands created by

strict application of the arcs-of-circles method in areas like Stefansson Sound simply are not "seaward and outside of" the lands granted to the States under the Submerged Lands Act. They are "landward and inside of" those lands.

Finally, the Court did not mandate strict application of the arcs-of-circles method, thereby precluding States from relying on the United States' historical practice embodied in the 10-mile rule, when it adopted the Convention for Submerged Lands Act purposes. If it had, the Court would not have warned against "impermissible contraction" of a State's recognized territory in the name of foreign policy in both the 1965 *California* decision and the *Louisiana Boundary Case*.

g. The United States in the 1950s and 1960s used island fringes to delimit inland waters for Submerged Lands Act purposes.

The federal executive initially implemented the Submerged Lands Act as Congress intended, treating the seaward shores of fringing islands near the mainland as "in direct contact with the open sea" and drawing straight lines connecting such islands to mark the "seaward limits of inland waters," the position the United States was taking in its international relations.¹⁵ The United States also considered water areas enclosed by islands as inland waters for fisheries purposes in a series of regulations between 1956

¹⁵See, e.g., Ak. Ex. 85-087 (June 23, 1954 memorandum for the record by D. O'Connor, Assistant Chief, Division of Cadastral Engineering in the Bureau of Land Management, outlining the theory underlying the Chapman line); Ak. Ex. 85-107 (December 7, 1954 memorandum from Mr. Clement, Bureau of Land Management, to Mr. Parriott, Department of the Interior, stating that Mississippi Sound constituted inland waters of the State of Alabama); Ak. Ex. 85-126 (June 15, 1956 letter from the Director, Bureau of Land Management, to Assistant Interior Secretary D'Ewart stating that Alabama's coast line "follows the outer limit of the barrier islands").

and 1960, regulations later characterized by the State Department as "adoption by United States of [the] straight baseline method in measuring limits of [the] territorial waters of Alaska." See Report at 116-18.¹⁶ State Department Geographer Percy, moreover, prepared charts "showing straight baselines in southern Alaska, and some use was made of them by the Coast Guard and the Bureau of Commercial Fisheries" throughout the 1960s. *Id.* at 164-65 (footnotes omitted).¹⁷

In the late 1950s, the United States with the approval of the State Department took the same position in the *Louisiana* litigation.¹⁸ Report at 112-13. The Master refuses to

¹⁶The Master dismisses this evidence on the basis of the Court's analysis of these regulations in deciding that Cook Inlet in Alaska was not a historic bay, Report at 121, citing *United States v. Alaska*, 422 U.S. 184, 198 (1975), and because Interior Secretary Udall wrote Secretary of State Rusk that the fishery regulations "were not intended to enlarge or extend the territorial waters of Alaska in a legal or jurisdictional sense." See Report at 122 n. 88 and 119 n. 86. Alaska does not claim that Stefansson Sound is a historic bay, however. If the 10-mile rule were the United States' policy as the Court found in 1985, moreover, the regulations closing areas fringed by near-shore islands as inland waters did not enlarge or extend the waters of Alaska. They instead simply implemented the United States' 10-mile rule policy. This is far more plausible than construing the regulations as dramatically exceeding the jurisdictional authority of the Interior Department as the Master suggests.

¹⁷The Master dismisses this evidence, too, as being of questionable application to the Arctic and inconsistent with Percy's treatment of Chandeaur Sound. *Id.* at 165-66. The Percy charts nonetheless were consistent with the United States' pre-Convention position. As discussed below, moreover, whatever Percy thought about closing Chandeaur Sound did not prevent the United States from continuing to close it as inland waters under the Submerged Lands Act.

¹⁸See, e.g., Brief for the United States in Support of Motion for Judgment (Feb. 1957) (AK. Ex. 85-006) at 128-29, *United States v. Louisiana* (No. 11 (now No. 9), Original) (Oct. Term, 1956) (Chandeaur Sound is inland waters); United States' Brief in Support of

give the United States' briefs much weight as evidence of the delimitation method the United States would have applied to Alaska's Arctic coast at statehood, finding them subject to "three difficulties": (1) the Court did not determine the location of the Gulf States' coast line, leaving it for later adjudication; (2) the briefs were based on the United States' policy in 1953 when the Submerged Lands Act became law and did not reflect any changes required by the 1958 Convention; and (3) the briefs did not explain the theory underlying the concession that waters behind islands in Louisiana, Mississippi, and Alabama were inland waters. *Id.* at 113-15. The Master's "difficulties" aside, the United States' briefs show a continuing adherence to the 10-mile rule described by the Court in the *Alabama and Mississippi Boundary Case*.

In March 1961, Solicitor General Archibald Cox recited a number of principles for delimiting the Louisiana coast line that he derived from "various sources," including Secretary of State Webb's 1951 letter and the Convention, in nearly identical letters to the Coast and Geodetic Survey (Ak. Ex. 85-145, U.S. Ex. 85-407) and the State Department (Ak. Ex. 85-159, U.S. Ex. 85-406). Report at 144. He explained that the principles did not include the Convention's 24-mile closing line rule for bays, because that was "a departure from existing law." *Id.* The remaining principles, however, necessarily reflected prior United States' policy that was consistent with the Convention, including the 10-mile rule for near-shore islands: "Waters enclosed between the main-

Motion for Judgment on Amended Complaint (May 1958) (Ak. Ex. 85-007) at 177-78, *United States v. Louisiana* (No. 11 (now No. 9), Original) (Oct. Term, 1957) (areas between the mainland and barrier islands offshore Louisiana are inland waters); United States' Reply Brief on Motion for Judgment on Amended Complaint (Sept. 1958) (Ak. Ex. 85-014) at 43-44, *United States v. Louisiana* (No. 10 (now No. 9), Original) (Oct. Term, 1958) (fringing islands enclose inland waters, citing the Gulf States as examples).

land and off-lying islands which are so closely grouped that no entrance exceeds ten miles in width shall be considered inland waters." *Id.*

The Coast and Geodetic Survey's April 18, 1961 response included a memorandum by Shalowitz in which he concurred in Cox's statement of the 10-mile rule and found it "in conformity" with a general principle for islands:

The coast line should not depart from the mainland to embrace offshore islands, except where such islands either *form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters*, or they form an integral part of a land form.

Id. at 145-46 (emphasis added). The emphasized language, Shalowitz explained, "was the basis for drawing the Chapman Line and is in conformity with the concession [that Chandeleur Sound was inland waters] made by the Government in . . . the Louisiana case." *Id.* at 146 n. 110. He described the portico concept as an "amplification" of the ten-mile rule and illustrated it with a figure "which could equally well be described as showing a fringe of islands." *Id.* at 147 n. 111.

This evidence shows conclusively that the United States' historical 10-mile rule policy simply mirrors the straight baseline provisions of the Convention, albeit with a 10-mile limitation. Cox's 10-mile rule, Shalowitz's portico concept illustrated as a fringe of islands, and the Convention's authorization in Article 4.1 of straight baselines where there is a "fringe of islands" are simply different ways of saying the same thing.

The Master finds even this evidence insufficient to support the Court's 10-mile rule finding. Report at 150. His reasons, however, do not amount to "convincing evidence to

the contrary" that the Court's finding was wrong.¹⁹ The federal executive's implementation of the Submerged Lands Act, the United States' position in litigation under the Act in this Court, and both Cox's and Shalowitz's statements of principle derived from prior United States' policy and the Convention all support the Court's finding that the 10-mile rule was the United States policy from at least 1903 to 1961.

h. The United States followed the 10-mile rule even after the Court adopted the Convention for Submerged Lands Act purposes.

The United States continued to follow its pre-Convention 10-mile rule policy in its first submission to this Court *after* the Court adopted the Convention for Submerged Lands Act purposes in the 1965 *California* case.²⁰ Motion for

¹⁹The Master believes this evidence does not support the Court's 10-mile rule finding for three reasons: (1) Shalowitz did not close Redfish Bay as inland waters, *id.* at 147; (2) a State Department official cryptically noted that closure of Chandeleur Sound as inland waters "has been questioned," *id.* at 149 and n. 118; and (3) Shalowitz did not close Caillou Bay as inland waters, *id.* at 149. Redfish Bay, however, is not fringed by islands, compare U.S. Ex. 85-416, a chartlet of Redfish Bay, with 1 Shalowitz, *supra* note 3, at 162, Figure 25, nor is Caillou Bay. See Tr. 2950 (testimony of J.R.V. Prescott, an expert on political geography with a particular emphasis on international maritime boundaries, Tr. 2767 and Ak. Ex. 85-401, and author of *The Maritime Political Boundaries of the World* (1985)). A "questioning" of a foreign policy position by a State Department employee is hardly renunciation of that policy.

²⁰Precisely when the United States began to follow the Convention thus is not critical to determining its policy at the time of Alaska's admission in 1959. The United States, however, claimed before the Master that it "moved to the Convention rules immediately upon signing" it on September 15, 1958, Report at 134, a claim unequivocally refuted by evidence showing that the United States began to follow the Convention upon ratification in 1961. Raymond T. Yingling, Assistant Legal Adviser at the Department of State, stated in an affidavit the United States submitted in litigation with Alaska over Yakutat Bay that

Entry of a Supplemental Decree (No. 1).²¹ In this motion, the United States acknowledged that some of its claims were untenable in light of the Court's adoption of the Convention for Submerged Lands Act purposes, including its claims as to artificial jetties, islets and low-tide elevations, and 10-mile bay closing lines. *Id.* at 18-19. Nevertheless, the United States continued to "concede Chandeleur and Breton Sounds as inland water," Report at 156, a position entirely consistent with both the United States' pre-Convention 10-mile rule policy and the Convention's straight baseline provisions.

The Master finds the United States' lack of explanation for the continued concession "surprising." Report at 157. It is only surprising, however, if the Court's adoption of the Convention for Submerged Lands Act purposes *required* the United States to *change* its litigation position to comply with the Convention. Such changes *were* required for artificial jetties, low-tide elevations, and bay closing lines, all of which the United States explained. Where the United States' prior litigation position and the Convention's rules

the United States "maintained its traditional position" from Alaska's admission on January 3, 1959, until the Convention was ratified on March 24, 1961. See *United States v. Alaska*, 236 F.Supp. 388, 391-92 (D. Alaska 1964), *rev'd on other grounds sub nom. Alaska v. United States*, 353 F.2d 210 (9th Cir. 1965). Following ratification, the Convention expressed the United States' policy. *Id.*; also see Ak. Ex. 85-177 (January 15, 1963 letter from Secretary of State Rusk to Attorney General Kennedy) at 2 ("in view of the ratification of the Convention by the President with the advice and consent of the Senate, it must be regarded as having the approval of this Government and as expressive of its current policy").

²¹Motion by the United States for Entry of a Supplemental Decree (No. 1), Proposed Supplemental Decree, and Memorandum in Support of Motion (Nov. 1965), *United States v. Louisiana* (No. 9, Original) (Oct. Term, 1965) (Ak. Ex. 85-167). The Court handed down the *California* decision on May 31, 1965. The United States filed this motion on November 23, 1965.

were the *same*, as they were for claiming Chandeleur and Breton Sounds as inland waters, no explanatory comment was either necessary or appropriate.

In 1962, moreover, the United States and Louisiana had completed a joint study of the application of the Convention to the Louisiana coast, a study widely distributed to federal agencies. See Ak. Exs. 85-173 and -174. The United States, however, did not produce the study in this proceeding. Since the study specifically addressed the application of the Convention to the Louisiana coast, this "silence" is "evidence of the most convincing character," *Interstate Circuit*, 306 U.S. at 226, that the United States' continued closure of Chandeleur and Breton Sounds as inland waters was pursuant to Article 4 of the Convention. See *New York, New Haven & Hartford Railroad*, 355 U.S. at 256 n. 5; *Mammoth Oil Company*, 275 U.S. at 51.

The United States first signaled a possible change in its 10-mile rule policy three years later in a second motion in the *Louisiana* case. Motion for Entry of a Supplemental Decree (No. 2).²² The United States acknowledged claiming waters between the mainland and coastal islands as inland, citing Chandeleur and Breton Sounds, but claimed that policy was "at variance with the Convention." *Id.* at 79.

This claim was patently wrong. The United States only a page earlier had explained that the Convention authorized closing areas like Chandeleur and Breton Sounds as inland waters under Article 4. *Id.* at 78. Both the United States' pre-Convention practice and its continuing concession as to

²² Motion by the United States for Entry of a Supplemental Decree as to the State of Louisiana (No. 2), Proposed Supplemental Decree, and Memorandum in Support of the Motion of the United States and in Opposition to the Motion of the State of Louisiana (Jan. 1968) (Ak. Ex. 85-168), *United States v. Louisiana* (No. 9, Original) (Oct. Term, 1968).

Chandeleur and Breton Sounds were expressly permitted by — and not "at variance with" — the Convention.

The United States, thus, continued to follow the 10-mile rule at least through 1965, *after* the Court had adopted the Convention for Submerged Lands Act purposes.

i. The United States changed its position in 1971 for reasons unrelated to international relations.

In April 1971, a federal "Baseline Committee" for the first time marked the seaward limits of inland waters and the seaward limit of the United States' territorial sea on nautical charts. The Committee was instructed to apply the arcs-of-circles method strictly and "not to take up the political issue of whether the United States should or should not employ the method of straight baselines." U.S. Ex. 85-112 at 1. In Mississippi, Chandeleur, and Breton Sounds along the Gulf coast, in the Alexander Archipelago in Southeast Alaska, and in Stefansson Sound, the charts showed enclaves and pockets of high seas. Report at 166-67. This was the first time the United States disclaimed the inland waters status of those areas. See *Alabama and Mississippi Boundary Case*, 470 U.S. at 111 (discussing Mississippi Sound).

In response to Alaska's protests, the State Department considered adopting straight baselines for the Alexander Archipelago, a return to the United States' pre-Convention position. Two successive State Department Legal Advisers determined that the United States could employ straight baselines that were "fully consistent with the most conservative possible reading of Article 4" of the Convention and would have no adverse effect on the United States' *international* relations. Ak. Ex. 85-276 (January 16, 1973 memorandum from Legal Adviser Brower to various federal officials) at 2. One adviser took an even stronger position: "We do not believe the use of such a system will have a negative impact on our Law-of-the-Sea negotiating position, nor do we believe a continued refusal to use such a system is

justifiable in light of the fact that it is so clearly appropriate to this situation." Ak. Ex. 85-280 (August 30, 1972 memorandum from Legal Adviser Stevenson to various federal officials) at 12 (emphasis added).

Concerns over the *domestic* implications such a move might have, however, prompted the State Department to condition its non-opposition on a waiver by Alaska of Submerged Lands Act claims it otherwise might make if the United States adopted a system of straight baselines. Ak. Ex. 85-217 at 1, 3. Because of these domestic concerns, the matter was referred to the Office of Management and Budget, Ak. Ex. 85-290, and no further action was taken.

C. Stefansson Sound and other areas enclosed by islands on Alaska's north coast are inland waters.

This Court correctly determined in the *Alabama and Mississippi Boundary Case* that the 10-mile rule was the United States' policy from at least 1903 to 1961. "[I]n the *Fisheries Case*, the International Court of Justice ruled that the consistent and prolonged application of the Norwegian system of delimiting inland waters, combined with the general toleration of foreign states, gave rise to a historic right to apply the *system*." *Alabama and Mississippi Boundary Case*, 470 U.S. at 107 n. 10 (emphasis added). Alaska accordingly is entitled to apply the 10-mile rule to delimit its inland waters and its Submerged Lands Act grant.

The Master argues, however, that "fairness" might require a recommendation against Alaska, citing the Florida Keys, Nantucket Sound, and Caillou Bay. Report at 172-74. Florida, however, received "a three-marine-league [*i.e.*, nine mile] belt of land" off its Gulf coast, *United States v. Florida*, 363 U.S. 121, 129 (1960). It stipulated with the United States that "the narrow waters within the lower Florida Keys, the Marquesas and the Dry Tortugas are generally territorial seas and not inland waters" apparently because it had no practical effect on Florida's Submerged

Lands Act grant.²³ The 10-mile rule was a rule for *fringing* islands, moreover, and did not apply to other island groups. Massachusetts relied solely on a historic waters argument and did not argue that failure to use the 10-mile rule impermissibly contracted its recognized territory. As discussed above, the islands forming Caillou Bay do not fringe the coast. In any event, Caillou Bay bears no resemblance to Stefansson Sound and provides no support for denying application of the 10-mile rule in Alaska on the basis of "fairness." All of the States with coast lines that fit the 10-mile rule — Alabama, Louisiana, and Mississippi — have not had their boundaries redrawn to comport with the United States' current position, strict application of the arcs-of-circles method. A different result for Alaska, as recommended by the Master, would be both unfair and violate the requirement in section 6(m) of the Alaska Statehood Act that Alaska "shall have the same rights" as other States under the Submerged Lands Act.

Finally, the Master suggests that Stefansson Sound might have been considered an international strait, and not an inland sea, because the *Coast Pilot* says "[v]essels following the coast may avoid the heavy ice . . . off the barrier islands by passing inside the islands by way of one of the deeper entrances." Report at 139-40. Nothing in the record, however, indicates any use of Stefansson Sound for international navigation. In contrast, Special Master Walter E. Hoffman found that neither Vineyard Sound nor Nantucket Sound

²³ See Coast & Geodetic Charts C. & G. S. 1249-53, 1351, reprinted in Report of Albert B. Maris, Special Master (Sept. 1971), *United States v. Florida* (No. 52, Original) (Oct. Term, 1973) at 92-103, reprinted in *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases 1949-1987* (Michael W. Reed, G. Thomas Koester and John Briscoe, eds., 1991), at 562-73, showing that all of those "narrow waters" are within the three mile arcs delimiting the territorial sea and the lands underlying them thus were included in the Submerged Lands Act grant to Florida.

was an international strait despite some evidence of international shipping. Report of the Special Master at 67-68, *United States v. Maine (Massachusetts Boundary Case)*, (No. 35, Original) (Oct. Term, 1984), reprinted in Reed, *et al.*, *supra* note 23, at 779-80. Moreover, he also noted that the United States had conceded that Buzzard's Bay was inland waters even though "a significant amount of international shipping passes through the Cape Cod Canal." *Id.* at 68. Stefansson Sound's possible usefulness for domestic coastal traffic simply strengthens the analogy to Mississippi Sound, characterized in the *Alabama and Mississippi Boundary Case* as "an intracoastal waterway of commercial and strategic importance to the United States" but "of little significance to foreign nations." 470 U.S. at 102 (*see id.* at 102-05 as to its usefulness and importance).

The Court's 1985 finding that the 10-mile rule was the United States' position from at least 1903 until 1961 thus compels a ruling in Alaska's favor. The 10-mile rule was the United States' policy on January 3, 1959, when Alaska joined the Union and its title under the equal footing doctrine and the Submerged Lands Act vested. Along Alaska's north coast, all of the islands are less than ten miles apart. Report at 30. Strictly applying the arcs-of-circles method to delimit Alaska's Submerged Lands Act grant would impermissibly contract Alaska's recognized territory, a result the Court condemned in both the 1965 *California* decision, 381 U.S. at 168, and the 1969 *Louisiana Boundary Case*, 394 U.S. at 73-74 n. 97. It would contradict Congress's intent underlying both the Submerged Lands Act and the Alaska Statehood Act. Finally, it would reward the United States for adopting a position in its international relations to gain an advantage over the States in domestic Submerged Lands Act cases. *See Alabama and Mississippi Boundary Case*, 470 U.S. at 112. For these reasons the Court should reject the Master's recommendation that Alaska's Submerged Lands Act grant be determined by

strictly applying the arcs-of-circles method, and instead hold that the 10-mile rule for islands applies.

II. Dinkum Sands is an island under the Convention and is part of Alaska's coast line for Submerged Lands Act purposes.

The question here is whether Dinkum Sands is an island and therefore constitutes part of Alaska's coast line for purposes of delimiting the State's submerged lands. Dinkum Sands is an alluvial formation in the Flaxman Island chain (the islands that enclose Stefansson Sound) about eleven miles north-northeast of Prudhoe Bay. Article 10 of the Convention defines "island" as "a naturally-formed area of land, surrounded by water, which is above water at high tide."

The United States Coast and Geodetic Survey first surveyed Dinkum Sands in 1949-50. Report at 230-31. The federal surveyors reported that the feature "bares three feet at mean high water²⁴," *id.* at 231, making it unqualifiedly an island. Official United States' nautical charts showed it as an island for some years thereafter. *Id.* at 232, 242; Ak. Exs. 84A-201, -324, -325, -327, -328; *see* Tr. 510-15, 1514-18, 1611-12. In 1970 the Baseline Committee used it as a base point — that is, as part of Alaska's coast line — for delimiting the territorial sea, and continued to do so until 1983 (Report at 244; Ak. Ex. 84A-208), four years after this case was filed. The official leasing map the United States proposed in January of 1979 used Dinkum Sands as part of Alaska's coast line and measured the seaward limit of Alaska's submerged lands from it. Ak. Ex. 84A-102. The

²⁴The Convention's expression "high tide" has been equated with the tidal datum of mean high water. *See United States v. California* (Supplemental Decree), 382 U.S. 448, 450 (1966); *see also Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10, 23, 26 (1935); 2 Aaron L. Shalowitz, *Shore and Boundaries* ("2 Shalowitz") 365, n. 10 (U.S. Dept. of Commerce Pub. 10-1, 1964).

United States retreated from this position only after this case was filed,²⁵ and despite the Baseline Committee's continued treatment of Dinkum Sands as an island.

The 1949 survey remains the only "basic hydrographic survey"²⁶ of the area. Tr. 496-497. The United States concedes that Dinkum Sands was above mean high water then — *i.e.*, it was an island. Report at 244. Since then, it has been observed many times both above water (*id.* at 233) and above mean high water (*id.* at 276-77, 282), although it occasionally has been observed submerged, the fact that gives rise to this dispute.²⁷

The Master acknowledges that the Convention does not require that an island be *permanently* above high tide. *Id.* at 300. Without support in law or "legislative history," however, he finds that the Convention's definition of an island nonetheless contains an "implicit modifier" at least as strong as "'generally,' 'normally,' or 'usually.'" *Id.* at 302. Unsure how much of the time Dinkum Sands is below high tide, he cannot conclude that it is "generally, usually or normally" above high tide and therefore recommends that it be found not an island. *Id.* at 310.

Dinkum Sands is no less an island, however, than the far more dynamic "mudlumps" off Louisiana's coast. This

²⁵The United States filed the case in May 1979, and proposed not using Dinkum Sands to delimit Alaska's submerged lands in June, 1979. Report at 233.

²⁶Shalowitz describes a basic hydrographic survey in 2 Shalowitz, *supra* note 24, at 240, quoted in the Master's Report at 231 n. 6.

²⁷It is impossible to determine whether Dinkum Sands is an island by simply observing whether it is above or below water. The tidal range in the Beaufort Sea is only six inches, *id.* at 236, and much larger changes in water level are caused by non-tidal seasonal influences and weather. *Id.* at 236-239 and 246. During the open water months (July through September, when observations the Master relies on "primarily" were made), sea level can be 1.5 feet higher than at other times. *Id.* at 236-39, 246.

Court and others have consistently treated the mudlumps as islands despite their episodic submergence or outright disappearance. Dinkum Sands must be similarly treated. It is a permanent feature, *id.* at 288; since 1949 it has been observed above high tide and sometimes below, *id.* at 307-08; and the United States considered it an island for Submerged Lands Act purposes until 1979 and for purposes of its international relations until 1983.

Alaska makes alternative submissions. First, the Convention's definition of island contains no implicit modifier, and both prior law and practice establish that an island that is occasionally submerged is no less an island. Alternatively, Dinkum Sands is an island except when it is below high tide, even though it may be difficult to determine when that is.

A. A feature retains its status as an island even if it is sometimes submerged.

Although more dynamic than Dinkum Sands — to the point of ephemerality — the alluvial islands and mudlumps off the mouth of the Mississippi River are strikingly similar to Dinkum Sands. They move, disappear, and reappear.²⁸ Since *The Anna*, 165 E.R. 809 (1805), they

²⁸Mr. Miller, United States delegate to the 1930 Hague Codification Conference, described them as "moving islands off the mouth of the Mississippi." 3 Acts of Conference, *supra* note 11, at 147 (AK. Ex. 85-001). B. A. Hardey, Chairman of the Louisiana Mineral Board, testified at a Submerged Lands Act hearing that "[s]ome of the islands disappear and bob up somewhere else sometimes." *Joint Hearings on S. 1988*, 80th Cong., 2d Sess. 111-112 (1948). John L. Madden, Louisiana Special Assistant Attorney General, explained that "[o]ver broad and far-reaching spaces offcoast, our marginal waters are astoundingly shallow — so shallow, in fact, that islands therein appear to move in some mysterious manner, emerging here and sinking there, and being lost until they are discovered as forming a part of the coast or other islands of greater permanence." *Id.* at 384-385. Solicitor General Cox "described them as islands despite their highly changeable and perhaps mobile nature." Report at 292 (citation omitted). The Master, however, inti-

have consistently been treated as islands and used to delimit both the nation's maritime boundaries and Louisiana's Submerged Lands Act grant.

The Anna presented the issue whether a British privateer had captured the vessel on the high seas or within the United States' maritime boundaries. Resolution of the issue turned on whether the boundaries were reckoned from certain mudlumps off the mouth of the Mississippi River. Captor's counsel argued that the mudlumps were not United States' territory because they had "no line of coast" and were merely "temporary deposits," that the court should not recognize such "equivocal" features as possessing "the ordinary qualities of territory," that territory "should form a visible part of the country to which they are ascribed" so neutrals could see them, and that they should but did not afford a base for defending the nation. *Id.* at 811-12 (emphasis deleted). The court rejected the argument:

[T]here are a number of little mud islands composed of earth and trees drifted down by the river which form a kind of portico to the mainland. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of "*no man's land*," not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds' nests. . . . I am of a different opinion; I think that the protection of territory is to be reckoned from these island; and that they are the natural appendages of the coast on which they border, and from which they indeed are formed. . . . Whether

mates (without determining) that the record in this case may not establish sufficient similarity between the Mississippi mudlumps and Dinkum Sands: "The record contains no evidence, however, of the behavior of these features in general." Report at 292-93 n. 49. With all due respect, the foregoing descriptions of the mudlumps' behavior establishes that they are a remarkably apposite precedent for determining whether Dinkum Sands is an island.

they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

Id. at 815 (footnote omitted).

Since *The Anna*, this nation has uniformly treated these ephemeral features as islands for various purposes,²⁹ including using them to delimit its maritime boundaries in international relations and Louisiana's Submerged Lands Act grant. For example, the United States' delegate to the 1930 Hague Codification Conference observed that any definition of island would have to accommodate a wide variety of circumstances, including "the moving islands at the mouth of the Mississippi." 3 *Acts of Conference*, *supra* note 11, at 146-47 (AK. Ex. 85-001). In 1963, "Solicitor General Archibald Cox described them as islands [in an opinion addressing 'Title to Naturally-Made Lands Under the Submerged Lands Act'] despite their highly changeable and perhaps mobile nature." Report at 292 (citation omitted). The *Louisiana* case presented the question whether certain mudlumps were "extensions of the mainland" from which bay closing lines could be drawn. The United States argued that *The Anna* determined only that the mudlumps were islands, not that they were part of the mainland. *Louisiana Boundary Case*, 394 U.S. at 64 n. 84. The Court equated the mudlumps with islands when it stated that "every . . . mudlump or other insular formation" could, under proper circumstances, be deemed part of the mainland. *Id.* at 65 n. 84 (emphasis added).

²⁹ See, e.g., Armstrong's discussion of President Roosevelt's executive orders proclaiming certain bird refuges that treated the mudlumps as islands. Report of Special Master Walter P. Armstrong, Jr. (July 31, 1974) at 11-12, *United States v. Louisiana* (No. 9, Original) (Oct. Term, 1974), reprinted in Reed, et al., *supra* note 23, at 173 (discussing Exec. Order No. 675 (1907) and Exec. Order 682 (1907)).

Five years after the decision in the *Louisiana Boundary Case*, Special Master Armstrong recommended, and the Court agreed, that Louisiana's coast line should be measured from the mudlumps. Report at 292.

Further, both English and United States common law have accorded island status to other features that periodically disappear. For centuries, the English rule has been that land that submerges retains its character unless it is submerged for so long that it is no longer identifiable if it eventually reappears. Sir Matthew Hale's³⁰ description has often been quoted:

If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his propriety

Hale, *De Jure Maris* (Francis Hargrave, ed. 1787), reprinted in Stuart A. Moore, *A History of the Foreshore* 381 (1888). How long the land is submerged is irrelevant so long as it is not permanent:

[A]ccordingly it was held by Cooke and Foster, *M. 7 Jac. C.B.* though the inundation continue forty years.

. . . .

But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make it out where and what it was; for he cannot lose his propriety of the soil, though it be for a time

³⁰Described by Shalowitz as "one of the foremost jurists of 17th century England." 1 Shalowitz, *supra* note 3, at 91.

become part of the sea, and within the admiral jurisdiction while it so continues.

Id. at 381, 383.

State courts also have employed Lord Hale's rule. The Supreme Court of Illinois found that a landowner did not lose title to an island, totally submerged for a considerable length of time, when it reappeared and was identifiable by its original description. *Randolph v. Hinck*, 277 Ill. 11, 18, 115 N.E. 182, 184 (1917). Similarly, the court in *Mulry v. Norton*, 100 N.Y. 424, 434, 3 N.E. 581, 585 (1885), stated that submergence does not affect title unless it is "followed by such a lapse of time as will preclude the identity of the property from being established upon its reliction," and the owners of beach property did not lose their title when the beach submerged due to storms and tides and subsequently reformed. *Id.* at 436; 3 N.E. at 586. In *Baumhart v. McClure*, 21 Ohio App. 491, 153 N.E. 211 (1926), the court found that a lot along Lake Erie that had been submerged for forty or fifty years still belonged, upon reappearance, to the original owner. *Id.* at 494; 153 N.E. at 212. See also *City of Chicago v. Ward*, 169 Ill. 392, 407-408; 48 N.E. 927, 931-32 (1897) (owner retained title to lands submerged and subsequently reclaimed in Lake Michigan).

Federal courts also follow the common law rule. In *Widdicombe v. Rosemiller*, 118 F.Cas. 295, 299-300 (C.C.W.D. Mo. 1902) (Nos. 2, 253-55), the court invoked "the fundamental doctrine laid down by Sir Matthew Hale's *De Jure Maris*" in holding that the United States' title to an island was not lost by erosion or submergence during a period of high water of the Missouri River. *Hammonds v. Ingram Industries, Inc.*, 716 F.2d 365, 369 (6th Cir. 1983), reaffirmed the rule "that an island's submergence effects its disappearance only if lasting for an extended period of time."

Finally, international law today affords continuing coast line status, in the context of straight baselines, to unstable islands even if the islands disappear altogether. Article 7.2 of the 1982 Law of the Sea Convention provides that base points for drawing straight baselines "may be selected along the furthest seaward extent of the low-water line and, notwithstanding subsequent regression of the low-water line, the straight baselines shall remain effective until changed by the coastal State"³¹

Notwithstanding these precedents, the United States argued that Article 10 implicitly requires that an island be "permanently" above high tide. The Master rejects this argument, noting that the word "permanently" had modified "above water at high tide" in a draft of the Convention's definition of an island and was *deleted* at the United States' urging. Report at 299-300. The Master nevertheless finds that Article 10 contains an "implicit modifier that is at least as strong as 'generally,' 'normally,' or 'usually'." Report at 302. As the Court wrote in discussing the United States' argument that a spoil bank should not be part of the coast because "it is not 'purposeful or useful' and is likely to be 'short-lived,'" "[i]t suffices to say the Convention contains no such criteria." *Louisiana Boundary Case*, 394 U.S. at 40-41, n. 48. Even the United States' expert on islands in international law has written that an island need not be *permanently* above high tide, citing *The Anna* among other authorities. Clive Symmons, *The Maritime Zones of Islands in International Law* 23 (1979).

³¹United Nations, *The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea* 4 (1983). This "deltaic baseline" provision of the 1982 Convention is among those recognized by the United States, while refusing to ratify the Convention, as reflecting customary international law. See Statement on United States Ocean Policy, 1 Pub. Papers of the President 378 (Ronald Reagan) (Mar. 10, 1983), 3 C.F.R. 22 (1983).

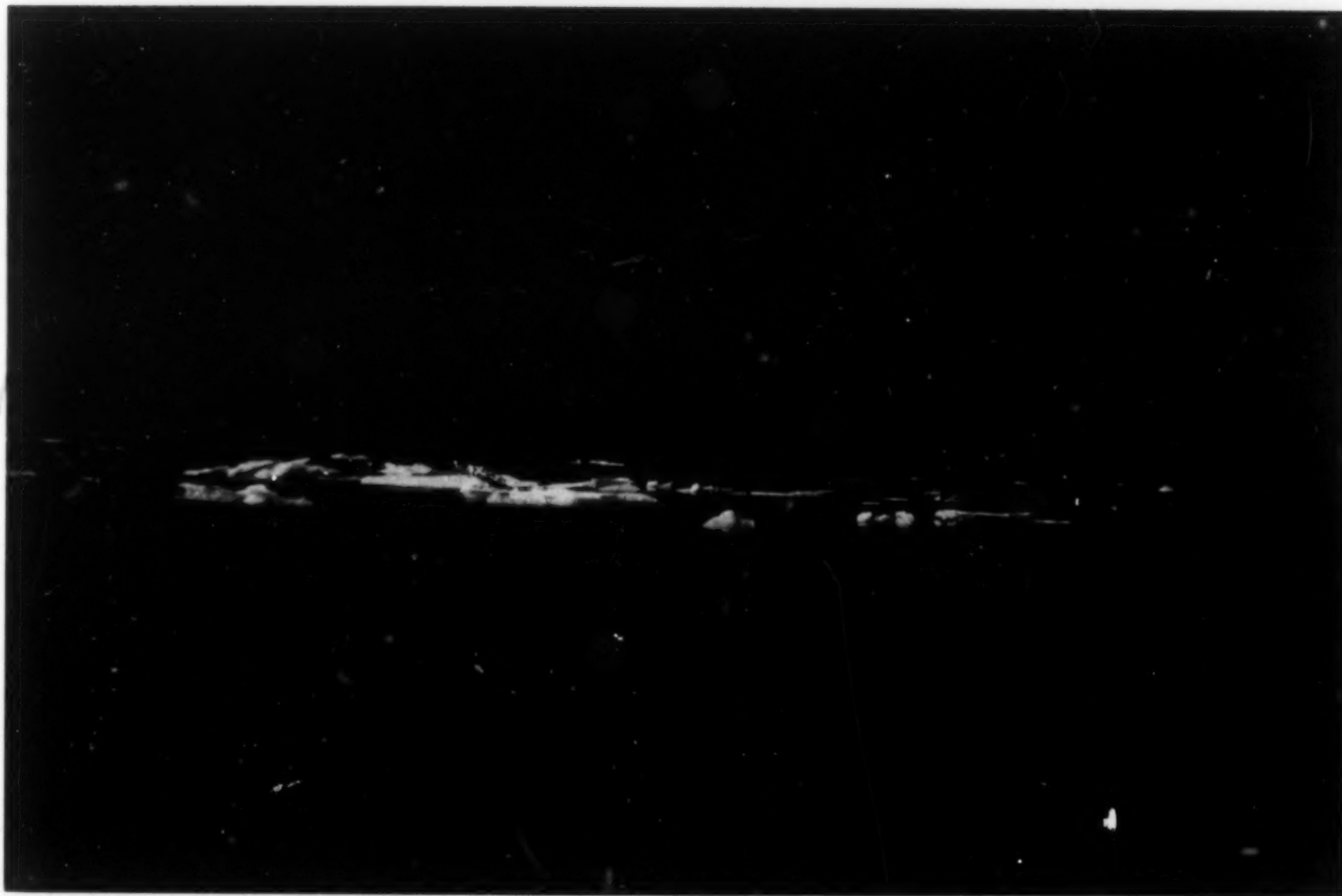


Figure 2. Admiral Nygren's 1949 photograph of Dinkum Sands, AK 84A-204, showing a 30-foot high survey target supported by guy wires anchored to 55-gallon drums filled with sand and gravel. Tr. 1330-32.

The Master's finding of an "implicit modifier" in Article 10 is unsupported by case law or the preparatory work of the Convention to which the Court has looked in interpreting equivocal provisions of the Convention. *See, e.g., Louisiana Boundary Case*, 394 U.S. at 43-47, nn. 52-63. Article 10 is unequivocal, however. Moreover, the preparatory work evidences no requirement that an island be "generally, normally, or usually" above water at high tide. In urging this revision of the Convention's definition, the Master recommends what the Court has repeatedly refused to do, *i.e.*, "fashion a new rule" that the drafters chose not to adopt. *See Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981); *see generally Federenko v. United States*, 449 U.S. 490, 512-513 and cases cited.

B. Dinkum Sands, a permanent alluvial formation that is far more stable than the Mississippi mudlumps, is an island under the Convention.

As discussed above, an island retains its island status even if sometimes submerged. While the feature is sometimes submerged, the United States concedes that Dinkum Sands has not disappeared. Report at 288. In fact the evidence shows that Dinkum Sands is far more stable than the Mississippi mudlumps.

Dinkum Sands was first definitively charted in 1949 when a United States Coast and Geodetic Survey party reported it had discovered an island lying between Cross Island and Narwhal Island in the Alaskan Beaufort Sea. Report at 231. The official record of the survey, or "smooth sheet," states that Dinkum Sands "bares three feet at mean high water." *Id.* Admiral Harley Nygren, a member of the survey party, described the 1949 survey of the Beaufort Sea and the discovery of Dinkum Sands, and produced a photographic slide he had taken of Dinkum Sands several weeks after its first sighting by his party. Ak. Ex. 84A-204 (reproduced opposite); *see* Tr. 1330-32 and 1362-63. At that time, the

island was "3 feet or 4 feet above the water level." Tr. at 1330.

The 1949 survey of the Beaufort Sea produced, insofar as relevant here, two nautical charts of the Dinkum Sands area. Report at 232. These were denominated Coast and Geodetic Survey Charts Nos. 9472 and 9473 (today redesignated as 16061 and 16046). Both charts as originally published depicted Dinkum Sands as an island, Report at 232, consistent with the survey's report that it "bares three feet at MHW." (Other maps also showed Dinkum Sands as an island, including maps prepared by the United States Geological Survey and the Army Mapping Service. Report at 243 and n. 15.)

That depiction changed as a result of a 1955 report from the *Merrick*, a Navy vessel that passed through the area and cryptically reported "Dinkum Sands — survey target and island not there." Report at 232 and 242; see Ak. Ex. 84A-330(a) at 9. The *Merrick* got no closer to Dinkum Sands than three miles, however, and "observations were impeded by dangerous ice conditions and a strong southwest wind tending to raise the sea level significantly." Report at 242. To avoid icebergs bearing down on it, the *Merrick* had to weigh anchor several times and take evasive action in poor visibility. Ak. Ex. 84A-330(b) and (c); Tr. 1521-40, 1666-1700. Since strong winds can elevate water levels "significantly," Report at 242, the *Merrick* easily could have missed a temporarily submerged Dinkum Sands, even if it was well above mean high water.

Although the 1949 survey remains the only "basic survey" of the area, Report at 231 and n. 6, the cryptic 1955 *Merrick* report prompted the Coast and Geodetic Survey — which in charting waters chooses to err on the side of navigational safety, see, e.g., 2 Shalowitz, *supra* note 24, at 89, 248 — to change its charts. Subsequent editions of the charts "conservatively" depicted Dinkum Sands as a low-tide elevation rather than an island. Report at 243. As a low-tide elevation,

Dinkum Sands would concededly be "insufficient to create Submerged Lands Act rights in Alaska." Report at 230.

Nevertheless, the Baseline Committee on July 27, 1970 used Dinkum Sands as an island to delimit the United States' territorial sea and Alaska's Submerged Lands Act grant. Ak. Ex. 84A-205, -210. In drawing the three-mile boundary from Dinkum Sands as it did from the other barrier islands in the Flaxman chain, the Committee relied on the only basic survey of the Beaufort Sea. Nygren, then an Admiral and a Committee member, believed the change in the chart's depiction of Dinkum Sands was based on insufficient evidence, and the Committee treated Dinkum Sands as an island for the next thirteen years, until nearly four years after this case was filed in 1979. Tr. 1369-71; see Ak. Ex. 84A-208 (Baseline Committee minutes for January 12, 1983, reflecting the Committee's elimination of the arcs of territorial sea generated by using Dinkum Sands as a basepoint).

Consistent with the Baseline Committee's approach, federal and state officials agreed on a proposed leasing map showing the submerged lands within three miles of Dinkum Sands as belonging to Alaska. Report at 232-33. Erk Reimnitz, an Interior Department staffer who was the United States' principal witness at the 1984 trial and had erroneously claimed that the 1949 survey was off by three feet,³² urged that Dinkum Sands not be treated as an island. Higher officials ultimately adopted his view, but not until June of 1979 (*id.* at 233), after this case had been filed.

In light of the legal authorities, the Baseline Committee's treatment of Dinkum Sands as an island and thus part of Alaska's coast line was correct. The Master elects not to treat it as an island because, applying his "implicitly modi-

³²See Erk Reimnitz, et al., U.S. Dept. of the Interior Geological Survey, *Dinkum Sands* (Open File Report 80-360) (U.S. Ex. 84A-504).

fied" definition of "island" to observations made "primarily" during the brief open-water seasons of 1981 through 1983, Report at 308, he cannot find that it is above water at high tide "generally," "normally," or "usually." Report at 309. Again, it should suffice that "the Convention contains no such criteria." *Louisiana Boundary Case*, 394 U.S. at 41 n. 48.

The Master's findings establish that Dinkum Sands has more island characteristics than the Mississippi mudlumps repeatedly deemed to be islands. It is a permanent feature, as the United States concedes. Report at 288. The few occasions it has been observed below high tide have generally been at the end of the open water period in late summer, *id.* at 309 and n. 66, just before it rebuilds prior to the autumn freeze-up. *Id.* at 286. The only "basic hydrographic survey" of the area found Dinkum Sands an island in 1949, a determination the United States concedes was correct. *Id.* at 242, 244, and 308. And the United States used it to delimit the territorial sea and Alaska's Submerged Lands Act grant until long after this litigation was begun. In light of this evidence, the handful of occasions on which Dinkum Sands was submerged are insufficient to change its status as an island.

C. Alternatively, Dinkum Sands is an island except when it is below high tide.

At the very least, Dinkum Sands should be deemed an island except when it is below the level of mean high water. The Master is uncomfortable with this notion, although he recognizes that it is consistent with the concept that the "normal baseline changes when the shoreline changes." Report at 305. According to the Master, "Article 10 does not demand an interpretation under which islands may frequently come and go." *Id.* He dismisses the argument summarily, without so much as a glance at the common law, asserting that it would require difficult monitoring and "go

against the Court's strong emphasis on definiteness and stability of grants under the Submerged Lands Act."³³ *Id.* at 306.

While monitoring may be inconvenient, the parties have practical means at their disposal to deal with those matters if they wish. See *Louisiana Boundary Case*, 394 U.S. at 34 (parties may resolve such problems through legislation or agreement). In any event, the Court's emphasis on definiteness and stability of Submerged Lands Act grants is unrelated to "definite and stable" coast lines. The Court emphasized certainty in the definitions used for Submerged Lands Act purposes. See *United States v. California*, 381 U.S. at 167. Indeed, in *United States v. Louisiana (Texas Boundary Case)*, 394 U.S. 1, 5 (1969), the Court expressed its view that an ambulatory coast line was a necessary consequence of its adoption of the Convention's definitions for Submerged Lands Act purposes because the Convention defines coast line as "the modern, ambulatory coastline." *Id.*

This concept became more deeply embedded in the Submerged Lands Act in the *Louisiana Boundary Case*, 394 U.S. at 32-35. There, Louisiana raised concerns identical to the Master's with regard to defining inland waters along Louisiana's shifting, changeable coast line. Louisiana argued that a fixed "'Inland Water Line'" was the only way to fulfill the "'requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States'" as required by this Court in the 1965 *California* case. *Louisiana Boundary Case*, 394

³³The Master also asserts that "navigational interests" favor using "reliably visible basepoints," and that this provides justification for why a feature that "frequently slumps below the high-water datum . . . should not be treated as an island." Report at 304. Under the Convention, however, low-tide elevations within the territorial sea are used as basepoints for measuring the territorial sea. See Article 11. In light of its repeated sightings above mean high water, Dinkum Sands is more "reliably visible" than the average low-tide elevation.

U.S. at 32-33. The Court rejected Louisiana's concerns, and with them the notion that the Court was free "to adopt the definition which best solved the problems of . . . the peculiarities of the highly unstable Louisiana shore." *Id.* at 33.

At the least, then, Dinkum Sands is an island except when it is below high tide. To deny Alaska that much, when Louisiana received *permanent* property rights on the basis of the ephemeral Mississippi mudlumps, would contravene section 6(m) of the Alaska Statehood Act which entitles Alaska to the same rights under the Submerged Lands Act as other States.

The Court accordingly should reject the Master's recommendation with respect to Dinkum Sands and decree that it is an island to be used as part of Alaska's coast line under the Submerged Lands Act. Alternatively, it is an island except when it is below water at high tide.

III. The submerged lands within the exterior boundaries of NPRA passed to Alaska at statehood.

Alaska excepts to the Master's recommended finding that the United States retained title to lands underlying tidally influenced waters inside the boundary of the National Petroleum Reserve-Alaska ("NPRA") and, as a result, defeated Alaska's title to those lands at statehood.

Whether a pre-statehood federal reservation defeated State title to submerged lands and retained title in the United States was addressed in *Utah Division of State Lands v. United States* ("*Utah*"), 482 U.S. 193 (1987). In *Utah*, the Court summarized the teachings of prior equal footing doctrine cases: (1) the United States holds lands under navigable waters in Territories "in trust" for future States; (2) while the United States can defeat a new State's title by a pre-statehood conveyance to a third party, it will do so "only 'in case of some international duty or public exigency'"; and (3) the Court will not "lightly infer a congressional intent to defeat a State's title" and will "begin

with a strong presumption against conveyance" that will not be overcome "unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters" *Id.* at 196-98 (citations omitted) (emphasis in original).

The Court has found only once that Congress intended to convey submerged lands within a territory, a "singular exception" to the rule of State ownership which "depended 'on very peculiar circumstances.'" *Id.* at 198 (citation omitted). Unlike a pre-statehood conveyance that necessarily defeats State title, moreover, Congress may not intend a pre-statehood reservation to have that effect as it may still hold the lands "for the ultimate benefit of future States" and "control, develop, and use the waters for its own purposes" even if the land later passes to the State. *Id.* at 202 (citation omitted). As a result, the Court will not find that a pre-statehood federal reservation defeats a new State's title unless the United States establishes both "that Congress clearly intended to include land under navigable waters within the federal reservation" and "that Congress affirmatively intended to defeat the future State's title to such land."³⁴ *Id.* (emphasis added). Under this stringent two-

³⁴The Master finds that there is "a less demanding standard" for showing that a pre-statehood withdrawal and reservation of lands underlying the territorial sea defeated State title under the Submerged Lands Act than the *Utah* standard for showing that a pre-statehood withdrawal and reservation of lands underlying inland waters defeated State title under the equal footing doctrine. Report at 394. Congress intended, however, that *Pollard* and its progeny apply equally to both inland waters and the marginal sea. See S. Rep. No. 133, 83d Cong., 1st Sess. 6-8 (1953), reprinted in 2 1953 U.S. Code Cong. & Admin. News 1474; H.R. Rep. No. 695, 82d Cong., 1st Sess. 5 (1951), reprinted in 2 1953 U.S. Code Cong. & Admin. News 1395 ("1951 House Report"), incorporated in H.R. Rep. No. 215, 83d Cong., 1st Sess. 1 (1953), reprinted in 2 1953 U.S. Code Cong. & Admin. News 1385; H.R. Rep. No. 1778, 80th Cong., 2d Sess. 6-9, 14-16 (1948), reprinted in 2 1953

pronged test, Congress did not defeat Alaska's title to the submerged lands within the NPRA's boundaries.

A. Congress did not clearly intend to include submerged lands in NPRA and did not clearly intend to defeat Alaska's title to them.

1. The Pickett Act did not authorize the federal executive to reserve the submerged lands in NPRA.

The Alaska Right-of-Way Act of May 14, 1898, ch. 299, 30 Stat. 409 (current version primarily at 43 U.S.C. §§ 942-1 - 942-9 (1988)), limited any "implied authority" the federal executive might have had to withdraw submerged lands. *See* Report at 406 n. 45. This Act codified for Alaska the principle that the United States holds the beds of navigable waters in territories "in trust" for future States. *Id.* The Master nonetheless concludes that Congress impliedly delegated to the federal executive authority to reserve Alaska's equal footing doctrine lands within NPRA in the Pickett Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (formerly codified at 43 U.S.C. §§ 141-42 (1970); repealed in part 1976; current version at 43 U.S.C. § 142 (1986)). *Id.* at 413. With "no direct evidence that thought was given to withdrawal of tidelands and submerged lands," the Master believes the Pickett Act must be construed to authorize such withdrawals by implication because some purposes for which it was enacted "may have been thought at the time to require them." *Id.*

Both the language of the Act and the circumstances at the time of its enactment, however, compel finding that

U.S. Code Cong. & Admin. News 1415 incorporated in the 1951 House Report at 6. The Submerged Lands Act excepts from the statutory grant to the States "all lands expressly retained by . . . the United States when the State entered the Union," 43 U.S.C. § 1313(a) (emphasis added), a statutory standard that is at least as strong as that for inland waters under *Pollard* and its progeny.

Congress did not intend the Pickett Act to authorize reservation of submerged lands. Congress limited the authority delegated to reservation of "public lands," 43 U.S.C. § 141 — *i.e.*, lands subject to sale or disposal under general laws unless another meaning is clear.³⁵ Tidelands and inland navigable waterways are not subject to sale or other disposal under general laws and therefore are not "public lands."³⁶ While the definition of "public lands" is not absolute in every context, the general definition is presumptively intended unless a different intent is clearly expressed.³⁷ The Pickett Act, moreover, grants authority to withdraw public lands "from settlement, location, sale, or entry" under the public land laws and reserve "the same" for public purposes. 43 U.S.C. § 141. Submerged lands, however, "were *already* exempt from sale, entry, settlement, or occupation under the general land laws." *Utah*, 482 U.S. at 203 (emphasis added) and cases cited.

The Master rejects application of the *Utah* analysis of "public lands" for two reasons. First, he finds that lands beneath navigable waters in Alaska were not "wholly immune from the general land laws" because Congress had opened a small area of tidelands to gold mining at the turn

³⁵ *Minnesota v. Hitchcock*, 185 U.S. 373, 391 (1902); *Barker v. Harvey*, 181 U.S. 481, 490 (1901); *Newhall v. Sanger*, 92 U.S. 761, 763 (1876).

³⁶ *Mann v. Tacoma Land Company*, 153 U.S. 273, 284 (1894); *see also Borax Consolidated, Ltd.*, 296 U.S. at 17 (1935); 2 Curtis H. Lindley, *Lindley on Mines* 1015 (3rd Ed. 1914) ("[t]here is no principle involved in the consideration of the public land system better settled or more clearly enunciated than that lands under tidal waters, and below the line of ordinary high tide, are not 'public lands'").

³⁷ *See Northern Lumber Co. v. O'Brien*, 139 F. 614, 616, (8th Cir. 1905) ("[T]he words 'public land' have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws.").

of the century. Report at 408. The Master's point here is unclear; the Pickett Act did not authorize withdrawals from the mining laws. See 43 U.S.C. §142 (1970) (before 1976 amendment). Second, he finds that the context of the Pickett Act suggests a different meaning for "public lands." His idea of "context" completely ignores the language of the statute, which is entirely consistent with the common definition of "public lands" — *i.e.*, lands subject to sale, location, and entry under the public land laws. This Court has defined "context" for the meaning of "public lands" as "reference to a definitional section or . . . context in a statute." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 549 n.15 (1987).

Nevertheless, even ignoring the plain language of the Pickett Act, its purposes did not require inclusion of the submerged lands. Recognizing that this Court found in *Utah* that even a reservation for a reservoir did not necessarily indicate an intent to reserve the bed of the lake, the Master says that some Pickett Act purposes "may have been thought at the time to require [submerged lands]." Report at 413. Attributing such a speculative intent to Congress disregards this Court's finding that "Congress 'early adopted and constantly has adhered' to a policy of holding land under navigable waters 'for the ultimate benefit of future States.'" *Utah*, 482 U.S. at 201. Further, it defies logic to infer that Congress thought it necessary to include submerged lands within the Act's otherwise nationwide purview when it would apply only to Arizona, New Mexico, Hawaii, and Alaska; the other 46 States had already entered the Union and taken title to their submerged lands.

Simply put, nothing establishes "that Congress clearly intended to include land under navigable waters within the federal reservation" authority granted by the Pickett Act, and such authority should not be inferred. *Utah*, 482 U.S. at 202.

2. There was no "public exigency" requiring the inclusion of submerged lands in NPRA.

The Master significantly weakens *Utah*'s stringent standards for finding that submerged lands had been included in a reservation. Congress must make clear its intent to reserve submerged lands, and the reservation must be based on a "public exigency" or "international duty." Report at 416-17; *Utah*, 482 U.S. at 197-98. The Master, however, interprets those standards so broadly that the required intent might be found in any case, effectively eliminating them. He concludes that there was a "public exigency" justifying the reservation of submerged lands in NPRA because the executive order creating it said that "the future supply of oil for the Navy is at all times a matter of national concern." Report at 423-25. He finds the requirement that the federal government clearly express an intent to include submerged lands satisfied because, in light of its purpose, NPRA's boundaries were drawn to include submerged lands. *Id.* at 422. Neither of those facts meets the standards for establishing that the United States intended to reserve the submerged lands.

The Master characterizes a "public exigency" as "an important purpose justifying the conveyance or reservation." Report at 417. Every reservation presumably is for an "important purpose." It is hardly to be supposed that federal reservations are created for unimportant purposes. "Exigency" connotes something more than merely "important," however, and is defined as "exact[ing] or requir[ing] immediate aid or action: pressing, critical." 5 Oxford English Dictionary 539 (2d ed. 1989). "Emergency" is defined as "a state of things unexpectedly arising, and urgently demanding immediate action." *Id.* at 176. Thus, emergency differs from exigency only in its unexpected nature. Reserving submerged lands for reasons that are pressing, urgent, and requiring immediate action is quite different from reserving them simply for "important reasons." Reserving them as a

possible future source of supply for the Navy was inherently not urgent as there was no immediate need and the lands in any event were already reserved and unavailable for private exploitation.

Further, mere inclusion of submerged lands within a reservation's boundaries does not establish an intent to reserve them. *See Utah*, 482 U.S. at 203. The Master inferred such an intent, however, from his speculative conclusion that the drafters had no reason to include submerged lands within the reserve's boundaries if they did not intend to reserve them. Report at 422. The United States frequently includes water areas within the exterior boundaries of reserves, however, without intending to reserve the submerged lands. *Utah*, 482 U.S. at 202; *Montana v. United States*, 450 U.S. 544, 554 (1981).

The plain language of the order, moreover, indicates that NPRA was to serve as a possible "future supply of oil for the Navy." Reserving the submerged lands was unnecessary for this purpose. The United States already held them in trust for the future State — *i.e.*, they already were reserved. No State yet existed that could interfere with their continued reservation or NPRA's purpose. Finally, oil and gas development was not permitted in submerged lands in Alaska in 1923 or for 35 years thereafter. Therefore, reserving the submerged lands was unnecessary to preserve the oil under them, and no "public exigency" required their inclusion.

3. Section 11(b) of the Alaska Statehood Act is not "affirmative" evidence that Congress intended to defeat Alaska's title.

The Master does not conclude that the executive order creating NPRA indicated that Congress intended to defeat Alaska's title to the submerged lands within NPRA. He instead finds the required expression of intent in section 11(b) of the Alaska Statehood Act, passed some 35 years later. Section 11(b) does not address submerged

lands at all, however. The Master bases his conclusion on inferences about how Congress might have wanted to exercise jurisdiction in NPRA rather than on any congressional expression of intent to defeat State title.

Because section 11(b) broadly describes the lands that would be subject to Congress's power to exercise exclusive legislation after statehood, the Master infers that Congress must have intended the United States to continue to own the submerged lands. His analysis does not satisfy this Court's requirement that Congress definitely declare or otherwise make very plain its intent to defeat the future state's title. He does not identify when or how Congress decided to defeat the State's title, and understandably so, for Section 11(b) contains no such provision. He concludes only that the manner in which Congress addressed exclusive legislative authority is *consistent* with federal ownership of the submerged lands. This does not meet the stringent *Utah* standard for defeating State title to sovereign submerged lands.

Section 11(b)'s purpose was to ensure that the State would not impose laws inconsistent with the military's use of certain lands. It does not address *title* at all. It provides that the lands it reaches are subject to Congress's power to exercise exclusive legislative *jurisdiction*, and defines the areas subject to this power as those lands to which the United States has title and uses for military purposes, including NPRA.

Section 11(b) constitutes State consent to exclusive Congressional legislative authority for military areas as required by the "enclave clause" of the United States Constitution, art. I, § 8, cl. 1.³⁸ This Court has interpreted the State

³⁸The enclave clause provides that Congress shall have power "[t]o exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

consent requirement as applying only to exclusive federal jurisdiction, not to the United States' ability to "purchase" land. See, e.g., *Kohl v. United States*, 91 U.S. 367, 374 (1876). The Congressman primarily advocating Section 11(b) explained that it would give Congress the *option* to exercise exclusive jurisdiction *if it chose*, but that "there shall be *concurrent* jurisdiction *unless* Congress by future action should reserve or pass legislation which would grant *exclusive* jurisdiction to the Federal Government." *Hawaii-Alaska Statehood: Hearing Before the House Comm. on Interior and Insular Affairs*, 84th Cong., 1st Sess. 261 (1955) (comments by Rep. Saylor) (emphasis added). Thus, interpreting section 11(b) as definitely declaring an intent to defeat Alaska's title gives it unintended meaning.

The Master assumes that the United States must *own* all lands within a military area to exercise exclusive jurisdiction. Ownership is not required for the exercise of jurisdiction, however, and Congress had no reason to defeat State title to submerged lands for it always retains plenary authority to regulate navigable waters for defense purposes. See 43 U.S.C. § 1314(a); *Pollard*, 44 U.S. (3 How.) at 229-30; cf. *Utah*, 482 U.S. at 208 (vesting of Utah's title to the bed of Utah Lake would not prevent the United States from subsequently developing a reservoir or water reclamation project).

The District Court for Alaska recently rejected the United States' similar section 11(b) analysis in a case addressing the effect of Public Land Order ("PLO") 82, a 1943 withdrawal of the entire North Slope of Alaska (48 million acres) that reserved minerals "for use in prosecution of the war":³⁹

The United States attaches talismanic significance to section 11(b) and 11(b)(iii) of the [Alaska Statehood

³⁹8 Fed. Reg. 1599 (1943). PLO 82 was revoked in 1960, barely a year after Alaska's admission. Public Land Order 2215, 25 Fed. Reg.

Act], yet these sections simply make no reference to lands beneath navigable waters in PLO 82. When considered in light of Congress' definite intent not to defeat state title to PLO 82 submerged lands [when the lands were reserved] in 1943, it is extraordinary to suggest that Congress expressed the opposite intent through the broad terms of section 11(b) and 11(b)(iii).

Alaska v. United States, No. A87-0450-CV (HRH) (D. Alaska 1996) (Order on State of Alaska's Motion for Partial Summary Judgment and the United States' Cross-Motion for Partial Summary Judgment) at 64-65 (attached hereto as Appendix B).

The Master analyzes Congress's intent in a manner prohibited by *Utah*, inferring from Congress's reservation of the power of exclusive legislation an intent to defeat State title to the submerged lands. *Utah* precludes that conclusion because Congress in no way indicated that it meant to defeat the State's title. Doing so simply was not necessary to regulate the waters for defense purposes. Without the requisite clear expression of Congress's intent to defeat State title to these lands, title is presumed to have passed to the State. *Utah*, 482 U.S. at 197-98.

That presumption is bolstered by Congress's awareness of both the general rule that the United States holds submerged lands in territories in trust for future States and the codification of the rule in the 1898 Alaska Right-of-Way Act. Report at 438. The Master concludes that this fact shows only "congressional awareness of the general rule" and "does not speak to whether Congress meant to make an exception to the general rule" for NPRA. *Id.* The Master's

12,599 (1960). Nonetheless, the United States claims that it defeated Alaska's equal footing doctrine title to all of the lands underlying navigable waters on the North Slope. Solicitor's Opinion M-36911, 86 Interior Dec. 151 (1978), *supplemented and modified*, 100 Interior Dec. 103 (1992).

comment misses the point, for the rule is that title to lands underlying navigable waters passes to a new State under the equal footing doctrine *unless* Congress *affirmatively defeats* State title. Had Congress intended an exception to the general rule, it would have said so. In the face of its awareness of the equal footing doctrine and silence as to any exception, the only permissible inference is that it intended no exception.

B. An attempt by the United States to retain title to submerged lands in a statehood act would violate the equal footing doctrine.

Even if Congress had clearly expressed an intent *in the Alaska Statehood Act* to retain the submerged lands in NPRA after statehood, it would have run afoul of the equal footing doctrine. The doctrine prohibits federal retention of sovereign lands as *a condition of statehood*; alternatively, it limits any federal retention to the narrowest interests necessary.

1. Withholding sovereign rights as a condition of statehood would violate the equal footing doctrine.

The equal footing doctrine prohibits the United States' retention of submerged lands in a statehood act. The Master's conclusion that a section of the Alaska Statehood Act defeated State title is based on the unconstitutional premise that Congress can withhold State sovereign rights as a condition to granting statehood. If section 11(b) in fact provided that the State would not receive title to the lands underlying navigable waters in NPRA, it would be an unconstitutional condition to statehood, an infringement of State sovereignty that would be void.

This Court has long considered provisions of a statehood act that purport to condition the new State's admission to the Union on a retention by the United States of a part of the new State's sovereignty to be a violation of the equal

footing doctrine. In *Pollard*, the Court held that a State's title to lands underlying navigable waters is conferred not by Congress but by the Constitution, and Congress cannot retain title as a condition of statehood:

[T]o Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

Id. at 229. As the Court stated in *Corvallis Sand & Gravel*, 429 U.S. at 374 (footnote omitted),

the Court [in *Pollard*] established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party [after statehood] was capable of defeating.

The Court reaffirmed the *Pollard* equal footing rule and extended it to State sovereign rights generally in *Coyle v. Smith*, 221 U.S. 559, 570 (1911). The Court determined that limitations on State sovereignty imposed as a condition of admission to the Union included in a statehood act (in that case a limitation on Oklahoma's power to determine the location of its capital) were invalid because the Constitution requires that all new States be admitted with all the powers of sovereignty and jurisdiction that pertain to original States. *Id.* at 566-74.

The United States' retention of lands underlying navigable waters as a condition of statehood would require that the State enter the Union on less than equal footing. Title to such lands is a direct incident of State sovereignty. *Hardin v. Jordan*, 140 U.S. 371, 381 (1891). "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a

presumption against their separation from sovereignty must be indulged." *United States v. Oregon*, 295 U.S. 1, 14 (1934). A State's interest in lands underlying navigable waters is different from its interest in uplands, which can be bargained for in a statehood compact without infringing upon State sovereignty. See *Stearns v. Minnesota ex rel. Marr*, 179 U.S. 223, 244-45 (1900) (drawing a distinction between the validity of statehood compact provisions referring to Sovereign State rights and obligations and those that constitute "a mere agreement in reference to property").

A compact provision under which the United States would retain lands that are a direct incident of State sovereignty is no "mere agreement in reference to property." A State, as sovereign, holds title to the lands underlying navigable waters in trust for the public. See *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892). While a pre-statehood conveyance does not violate the equal footing doctrine, this differs from federal retention of submerged lands as a condition of statehood. Federal territories are not entitled to equal rights of sovereignty. Conditioning a State's admission on a relinquishment of title to sovereign lands, on the other hand, diminishes the new State's sovereignty and forces admission on a less-than-equal footing with other States.

The authorities the Master cites cannot be read to condone a federal retention of submerged lands as a condition of statehood. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), found that an offshore fish trap was within the Metlakatla Indian Reservation. The Master finds significant the Court's statement that Congress's power "to make the reservation inclusive of the adjacent waters and submerged land, as well as the upland, needs little more than statement." *Id.* at 87; Report at 399. This was dictum, however, as the issue was whether Congress included adjacent waters within the boundaries of the reservation, described in the Act creating it as "the body of lands known as

Annette Islands." *Id.* Reservation of the submerged lands was not an issue in the case. Further, the case did not address Congress's power to defeat a State's title by retaining submerged lands. The Court decided it more than 40 years before Alaska's statehood and nearly 70 years before declaring this issue undecided in *Utah*.

The Master also cites two cases in which the Ninth Circuit found that pre-statehood reservations defeated Alaska's title to submerged lands. *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971); *United States v. Alaska*, 423 F.2d 764 (9th Cir. 1970), cert. denied 400 U.S. 967 (1970); Report at 401. These cases preceded *Utah*, however, and simply assumed that federal reservations defeated State title without applying *Utah's* two-prong test.

Finally, the Master notes that the Submerged Lands Act assumes that the United States may retain lands beneath navigable waters, as the rights it grants or confirms are subject to an exception for "all lands expressly retained by . . . the United States when the State entered the Union." 43 U.S.C. § 1313(a); Report at 401. Equal footing doctrine lands, however, are not lands that Congress decides to convey at statehood, and thus are unaffected by any exceptions in the Submerged Lands Act. These lands pass as a matter of constitutional law to the new State because of their special nature as sovereign lands. *Pollard*, 44 U.S. at 230.

The lands that pass to the new State under the equal footing doctrine consist of those underlying inland navigable waters and tidally influenced waters, and between ordinary high and low tides. The incorporation of the Submerged Lands Act into the Alaska Statehood Act constituted a grant only of the lands extending three miles seaward of the State's coast line, which do not pass to the State automatically. See *United States v. California*, 332 U.S. 19 (1947). As Congress granted only the lands underlying the marginal sea, it could only exclude lands within this category. The

Submerged Lands Act could not supersede the constitutionally-based equal footing doctrine. *See Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 318 (1973) ("The Submerged Lands Act of 1953 did not disturb [the equal footing doctrine]"); *see also Corvallis Sand & Gravel*, 429 U.S. at 371 n. 4. As to lands that Congress could except from the Submerged Lands Act grant to the States, moreover, Congress mandated that they be "*expressly retained*," 43 U.S.C. § 1313(a) (emphasis added), a requirement at least as stringent as that for equal footing doctrine lands. *See* n. 34 *supra*.

2. **When an international duty or a public exigency necessitates federal retention of submerged lands, the United States' retained interest should be limited to those rights absolutely necessary rather than fee title.**

Even if the Court finds that in some circumstances the United States can defeat a new State's title to submerged lands as a condition of statehood, the Master's recommendation still goes too far. His conclusion that the United States retains full title to the NPRA submerged lands unnecessarily diminishes the equal footing doctrine. If the United States must retain some ownership of submerged lands after statehood, it should retain only those interests justified by a public exigency or international duty and only as long as that condition exists. In this case, for example, the NPRA executive order would reserve only the oil and gas and not interfere with any uses of the submerged lands or waters that are compatible with that purpose.

Federal reservations and withdrawals often do not require a taking of full title. This Court recognized early that the United States could convey title subject to certain reserved rights. The earliest cases dealt with conveyances to private parties subject to the right of Indians to occupy the lands. *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

Moreover, the United States commonly transfers ownership of land to third parties while reserving certain specific rights to itself. *See, e.g.,* Act of March 8, 1922, ch. 96, § 2, 42 Stat. 416, *codified as amended* at 43 U.S.C. § 270-12 (1996) (oil, gas, and mineral rights reserved from homestead patents).

Under this analysis, even when the United States clearly intends to continue using submerged lands after statehood because of some international duty or public exigency, it should retain only such limited rights as are essential to effectuate the purpose of the withdrawal. A necessary corollary of this principle is that once the international duty or public exigency no longer exists and a withdrawal or reservation is revoked, the State's "naked fee" ripens into full fee simple title. *See, e.g., Beecher v. Wetherby*, 95 U.S. 517, 525 (1877).

This result would best serve the public interest in using navigable waters for commerce, fishing, and navigation. In Alaska, the Master's assumption that the United States will substitute for the State in holding submerged lands in trust for the public has not proven true. The United States systematically has conveyed submerged lands within pre-statehood withdrawals to private parties without determining navigability. *See, e.g., Alaska v. United States*, No. 87-0450-CV (HRH) (Appendix B), *supra* 65, at 7 n. 12.

For all of the foregoing reasons, the Court should reject the Master's recommendation that the United States be found to have retained the submerged lands within NPRA. The Court instead should hold that they passed to Alaska at statehood as a direct incident of State sovereignty under the equal footing doctrine.

CONCLUSION

Alaska accordingly submits that the Master's labored recommendations on Stefansson Sound and other areas enclosed by fringing islands less than ten miles apart,

Dinkum Sands' status as an island, and ownership of the submerged lands within NPRA should not be followed. The Court instead should enter a decree that (1) Alaska's rights in Stefansson Sound and other areas enclosed by near-shore fringing islands less than ten miles apart must be determined under the 10-mile rule that the Court found was the United States' policy from at least 1903 until 1961; (2) Dinkum Sands is an island and constitutes a part of Alaska's coast line for Submerged Lands Act purposes (or, alternatively, that it is an island for Submerged Lands Act purposes except when it is below high tide); and (3) the submerged lands within the exterior boundaries of NPRA became Alaska's at statehood because Congress did not intend to include them in the reservation and did not affirmatively intend to defeat Alaska's title.

August 1996

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Appendix A

APPENDIX A:

Summary of evidence of American baselines practice leading up to the United States' Statement of the 10-mile rule at the 1903 Alaska Boundary Arbitration

(Excerpted from the record and from the "Chronological Outline of Relevant Events in American Foreign Policy with Respect to the Delimitation of the Territorial Sea and Other Maritime Zones, 1782-1985, filed with the Special Master May 28, 1985. A Revised version of the document was, with consent of counsel, submitted for the record in June of 1995. See Report at 20 n. 3.)

The Attorney General wrote in 1793: "[T]he property and dominion of the sea might belong to him who is in possession of the lands on both sides, though it be open as a gulf, or open above and below as a strait." *Seizure in Neutral Waters*, 1 Op. Att'y Gen. 32, 36 (1793) (citation omitted). (Another of the Court's Masters rested his conclusion that islands could enclose inland waters in part on this statement. Report of the Special Master, *United States v. Maine (Massachusetts Boundary Case)* (No. 35, Original) (Oct. Term, 1984), reprinted in *The Reports of the Special Masters of the United States Supreme Court in the Submerged Lands Cases 1949-1987* (Michael W. Reed, G. Thomas Koester and John Briscoe, eds., 1991), at 750.

Secretary of State Pickering informed Virginia Lieutenant Governor Wood on September 2, 1796, that the United States' offshore jurisdiction extended three miles "from our shores, with the exception of any waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may." Ak. Ex. 85-009.

On May 17, 1800, Secretary of State Madison directed United States representatives Monroe and Pinkney to negotiate for a neutrality zone that would include "the harbours or the chambers formed by headlands." Quoted in 13 Naval

War College, *International Law Topics and Discussions* 1913 36 (1914) (Ak. Ex. 85-008). The "collection district" for the collection of duties on imports and tonnage within territory ceded to the United States under the Louisiana Purchase was described as including "all navigable waters, rivers, creeks, bays and inlets" in the Gulf of Mexico. Ch. 13, Act of February 24, 1804.

President Jefferson explained the "line of sight rule" for determining the seaward limit of inland waters on September 8, 1804:

The rule of the common law is that wherever you can see from land to land all the water within the line of sight is in the body of the adjacent country and within common-law jurisdiction. Thus, if in this curvature $a_c b$ you can see from a to b , all the water within the line of sight is within common law jurisdiction, and a murder committed at c is to be tried as at common [as opposed to admiralty] law.

Quoted in 13 Naval War College, *International Law Topics and Discussions* 1913 17 (1914) (Ak. Ex. 85-008).

In *The Anna*, 165 E.R. 809 (1805), the British Admiralty Court held that the United States' territorial sea was to be measured from alluvial islands off the mouth of the Mississippi River but more than three miles offshore. The islands, according to the court, form "a kind of portico to the mainland . . . [and are] the natural appendages of the coast on which they border, and from which, indeed, they are formed." *The Anna* at 815. (In the 1903 Alaska Boundary Arbitration, United States' representative Hannis Taylor observed that the British court in *The Anna* had fixed the United States' political coastline at the "uttermost limit of these mud banks." 7 *Proceedings of the Alaska Boundary Tribunal*, S. Doc. No. 162, 58th Cong., 2d Sess. 608 (1903).)

Wheaton advocated in 1815 that the seaward limits of jurisdiction be measured from a line extending "to the ports, harbours, bays, and chambers formed by headlands of the neutral Power." Henry Wheaton, *A Digest of the Law of Maritime Captures or Prizes* 55 (1815), quoted in Christopher B. V. Meyer, *The Extent of Jurisdiction in Coastal Waters* 94 (1937) ("Coastal Waters") (Ak. Ex. 85-804).

In the 1817 arbitration between Great Britain and the United States over the Bay of Fundy, the United States did not object to the "principle of base lines, the 'headland doctrine', ('Système de cap a cap')," represented by Great Britain as

a well known principle in the usage of States. The objections of the United States were not directed against this principle; but they produced evidence showing that the islands in question had for purposes of administration been treated as a part of Massachusetts.

Id. at 287.

In the Convention Respecting Fisheries, Boundary and the Restoration of Slaves (Oct. 20, 1818) between the United States and Great Britain, 8 Stat. 248, 1 *Treaties, Conventions, International Acts, Protocols and Agreements* 631 (William M. Malloy, ed. 1910) (S. Doc No. 357, 61st Cong., 2d Sess. (1910)), the United States renounced the rights of its citizens to fish "within three marine miles of any of the coasts, bays, creeks, or harbours, of his Britannic Majesty's dominions in America, not included within the above mentioned limits" According to Meyer, this was recognition by the United States of a British system of straight baselines. *Coastal Waters*, *supra*, at 290 (Ak. Ex. 85-804).

Kent in 1826 advocated claiming jurisdiction over areas between headlands considerably far apart. James Kent, *Commentaries on American Law* John M. Gould, ed. 30

(14th ed. 1896); see *Coastal Waters*, *supra* page 3, at 94 (Ak. Ex. 85-804) (quoting Kent).

In 1836, Wheaton revised his 1815 work and reaffirmed his support for a "headland-to-headland" theory of territorial jurisdiction. *Id.* (Ak. Ex. 85-804); Thomas W. Fulton, *The Sovereignty of the Sea* 598-99 (1911) (both citing Henry Wheaton, *Elements of International Law* (1836)).

On May 25, 1844, the United States protested the British seizure of the American schooner *Washington*. The protest note acknowledged that the intent of the 1818 United States/Great Britain Convention Respecting Fisheries, Boundary and the Restoration of Slaves was, "as it is in itself reasonable, to have regard to the general line of the coast; and to consider its bays, creeks, and harbours (that is, the indentations so accounted) as included within that line." See *Coastal Waters* *supra* page 3, at 290 (Ak. Ex. 85-804) (citing the British Case in the North Atlantic Coast Fisheries Arbitration at 92).

On January 23, 1849, Secretary of State Buchanan observed that "[t]he exclusive jurisdiction of a nation extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands" in responding to an inquiry from Mr. Matthew Jordan about possible redress for the British impressment of an American sailor. Buchanan's letter is quoted at page 44 of the Brief for the United States in Support of Motion for Judgment, *United States v. Louisiana* (Feb. 1957) (No. 11 (now No. 9), Original) (Oct. Term, 1956) (Ak. Ex. 85-006).

In 1853, Umpire Bates rendered arbitration decisions concerning the British seizure of two American vessels, the *Washington* and the *Argus*, which had been taken in the Bay of Fundy on the Canadian Coast. Great Britain claimed that the Bay of Fundy, 65 to 75 miles wide and 130 to 140 miles long, should be considered British waters closed by a line drawn from headland to headland. Umpire Bates ruled that the Bay of Fundy could not be considered a British bay, or

even a bay at all, to be closed from headland to headland because (1) it was too large, (2) it served as an international shipping area, and (3) one headland belonged to the United States. The decisions reaffirmed the headland-to-headland principle underlying the 1818 United States/Great Britain Convention Respecting Fisheries, Boundary and the Restoration of Slaves, but with a ten mile limit on the length of closing lines:

It was urged on behalf of the British Government that, by coasts, bays, etc., is understood an imaginary line drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty thus extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the Convention between France and Great Britain of 2nd August, 1839, in which 'it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.'

4 John B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* 4344 (1898). And see August, 1957 State Department Memorandum from Frank Boas to Raymond T. Yingling re "Article 7 of Part I of the Final Report of the International Law Commission on the Regime of the Territorial Sea and Other Material on the Delimitation of Bays" (Ak. Ex. 85-003) at 21:

Secretary of State Bayard in a letter to Secretary of the Treasury Manning, dated May 28, 1887, cited with approval the ten-mile rule for bays as used by Umpire

Bates on the London Commission of 1853 to set a "proper limit" upon the headland-to-headland doctrine.

On August 10, 1863, Secretary of State Seward wrote the Spanish Minister for Cuba that

the line of keys which confront other portions of the Cuban coast resemble . . . the keys which lie off the Southern Florida coast of the United States. The undersigned assumes that this line of keys is properly to be regarded as the exterior coast-line, and that the inland jurisdiction ceases there, while the maritime jurisdiction of Spain begins from the exterior sea front of those keys.

Ak. Ex. 85-029. In a May 18, 1869 letter to Secretary of the Navy Borie, Secretary of State Fish pointed out that the maritime jurisdiction of Spain extends one marine league "from the coast-line of the several islets or keys with which Cuba itself is surrounded." 1 John B. Moore, *Digest of International Law* 713 (1906). As Norway pointed out to the International Court of Justice in the *Fisheries Case*, the United States subsequently cited those letters as evidence of its policy. Counter-Memorial of the Government of the Kingdom of Norway, *Anglo-Norwegian Fisheries Case*, 1951 I.C.J. Pleadings (para. 446) (July 31, 1950) (English translation).

The New York Court of Appeals in 1866 noted that claiming territorial dominion over water areas enclosed by islands subject to a nation's military control was a "universal" rule

The rule is one of universal recognition, that a bay, strait, sound or arm of the sea, lying wholly within the domain of a sovereign, and admitting no ingress from the ocean, except by a channel between contiguous headlands which he can command with his cannon on either side, is the subject of territorial dominion. . . . Within this rule, the islands as the eastern extremity of

Long Island Sound are the *fauces terrae*, which define the limits of territorial authority, and mark the line of separation between the open ocean and the inland sea.

Mahler v. Norwich & New York Transportation Co., 35 N.Y. 352, 355-56 (1866) (citations omitted). The United States commented that *Mahler* "is in exact accord with the position of the United States." Reply Brief for the United States on Motion for Judgment on Amended Complaint (Sept. 1958) (Ak. Ex. 85-014) at 85, *United States v. Louisiana* (No. 10 (now No. 9), Original) (Oct. Term, 1958).

Secretary of State Bayard, in a May 28, 1886 letter to Secretary of the Treasury Manning, describes the United States' general position as measuring the territorial sea from the low-water mark on the mainland and each island. (Ak. Ex. 85-033) He makes clear, however, that there is an exception for bays and "landlocked" areas by citing (1) Secretary of State Pickering's September 2, 1796 letter to Virginia Lieutenant Governor Wood (discussed above, describing the United States' jurisdiction as extending three miles "from our shores, with the exception of any waters or bays which are so landlocked as to be unquestionably within the jurisdiction of the United States, be their extent what they may"); (2) Secretary of State Seward's correspondence with Spain in the 1860s (discussed above, in which the coast of Cuba is recognized as the line of islands off her shore); and (3) the "opinion of the umpire of the London commission of 1853" (discussed above, in which Umpire Bates established ten miles as "the proper limit" of the headland-to-headland doctrine).

In *Manchester v. Massachusetts*, 139 U.S. 240 (1891), this Court affirmed the Massachusetts Supreme Court's determination in *Commonwealth v. Manchester*, 152 Mass. 230, 25 N.E. 113 (1890), that Massachusetts could regulate fishing in Buzzard's Bay and that its State courts had jurisdiction over fishing violations therein. The Court noted

that the Island of Cuttyhunk, one of the Elizabeth Islands, was one headland of Buzzard's Bay, 139 U.S. at 243, and relied (among other cases cited) on *Martin v. Waddell* and *Pollard* in finding that Massachusetts possessed fisheries jurisdiction in Buzzard's Bay. 139 U.S. at 260. In reaching that conclusion, the Court established a six-mile criterion as the minimum for claiming areas enclosed in part by islands as inland waters:

We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast; that bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit

Id. at 258. Making clear that the two marine leagues referred to by the Court is a minimum, but not a maximum, the Court earlier stated that

[t]he limits of the right of a nation to control the fisheries on its seacoasts, and in the bays and arms of the sea within its territory, have never been placed at less than a marine league from the coast on the open sea; and bays wholly within the territory of a nation, the headlands of which are not more than two marine leagues, or six geographical miles, apart, have always been regarded as a part of the territory of the nation in which they lie.

139 U.S. at 257 (citations omitted)

The United States Naval War Code (June 27, 1900), explains that the territorial waters of a nation "include, to a reasonable extent, which is in many cases determined by usage, adjacent parts of the sea, such as bays, gulfs, and estuaries enclosed within headlands." The Code is quoted in Naval War College, *International Law Discussions*, (1903) (Ak. Ex. 85-039) at 18 and 103.

Appendix B

**In the United States District Court
For the District of Alaska**

STATE OF ALASKA,
Plaintiff

vs.

UNITED STATES OF AMERICA,
et al., Defendants.

No. A87-0450-CV (HRH)

ORDER

**State of Alaska
Motion for Partial Summary Judgment
and
United States of America
Cross-Motion for Partial Summary Judgment**

The State of Alaska has filed a motion for partial summary judgment.¹ The United States has filed a cross-motion for partial summary judgment.² Intervenor-defendants Arctic Slope Regional Corporation (ASRC) and Cully Corporation oppose the State's motion and support the United

¹ Clerk's Docket No. 94.

² Docket No. 96. Defendants include: the United States, the Secretary of the Department of the Interior, the Director of the Bureau of Land Management, and the Alaska State Director of the Bureau of Land Management. The Arctic Slope Regional Corporation and the Cully Corporation subsequently intervened as defendants.

States' motion.³ The State of Alaska has filed an opposition and reply,⁴ and the United States has filed an opposition and reply.⁵ ASRC and Cully Corporation have also filed a reply.⁶ Oral argument has been heard.

These motions raise the issue of whether title to lands underlying the Kukpowruk River in northwestern Alaska, if presumed to be navigable,⁷ passed to the State of Alaska at statehood or remained with the federal government pursuant to a pre-statehood withdrawal and reservation. The question of whether the state has title to the bed of the Kukpowruk River requires the resolution of two principal issues: (1) whether title to the lands underlying navigable waters within the boundaries of Public Land Order 82 (PLO 82) passed to the state at statehood; and (2) whether the Kukpowruk River is navigable. The parties agree that only the first question, whether title to the submerged lands in PLO 82 passed to the state at statehood,⁸ should be addressed at this point. The court will consider the motions pursuant to Rule 56, Federal Rules of civil Procedure.

Undisputed Facts

The Kukpowruk River arises in northwest Alaska and runs generally northward from its source in the De Long Mountains to its mouth near Point Lay on the Arctic Ocean.

³Clerk's Docket No. 98.

⁴Clerk's Docket No. 102.

⁵Clerk's Docket No. 105.

⁶Clerk's Docket No. 106. Supplemental authority was filed at Clerk's Docket No. 107.

⁷A river is navigable if it is used or susceptible to being used, in its ordinary condition, as a highway for commerce. *Alaska v. Ahlma, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990).

⁸The phrase "submerged lands" is used throughout to refer to lands beneath navigable waters.

The United States acquired the lands surrounding and beneath the Kukpowruk River in 1867 when it ratified the treaty of cession with Russia and purchased Russian America (Alaska) for \$7,200,000. 15 Stat. 539 (1867).

On January 22, 1943, the Department of the Interior (DOI) issued PLO 82, 8 Fed. Reg. 1599 (Jan. 22, 1943). PLO 82 withdrew certain public lands in Alaska "from sale, location, selection, and entry under the public land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws..." *Id.* The Kukpowruk River lies completely within the withdrawn land.

The purpose of PLO 82 was to reserve minerals for use in the prosecution of World War II. *Id.* PLO 82 included 48,800,000 acres in northern Alaska, 15,600,000 acres in the Alaska Peninsula, and 3,040,000 acres in the Katalla-Yakataga region. The area in northern Alaska was described as:

All that part of Alaska lying north of a line beginning at a point on the boundary between the United States and Canada, on the divide between the north and south forks of the Firth River, approximate latitude 68° 52' N. longitude 141° 00' W., thence western, along this divide, and the periphery of the watershed northward to the Arctic Ocean, along the crest of portions of the Brooks Range and the De Long Mountains, to Cape Lisburne.

*Id.*⁹

Shortly after the end of the war, and prior to statehood,¹⁰ the DOI revoked PLO 82 as to the Alaska Peninsula and Katalla-Yakataga acreage. Public Land Order 323, 11 Fed.

⁹Northern Alaska, as referenced in the Federal Register, is commonly referred to as the North Slope.

¹⁰Alaska entered the Union in 1959.

Reg. 9141 (Aug. 14, 1946). In 1958, PLO 1621 amended PLO 82 to permit mining and mineral leasing in an area between the Canning and Colville Rivers and in an area west of National Petroleum Reserve No. 4 (NPR-4) and east of Cape Lisburne. 23 Fed. Reg. 2637-38 (Apr. 18, 1958). The Kukpowruk River lies within the western portion of the area open to mining and mineral leasing. Alaska became a state in 1959 and entered the Union "on an equal footing" with all other states. Alaska Statehood Act (ASA), § I. The ASA included a provision making the Submerged Lands Act applicable to the State of Alaska. *Id.* at § 6(m). In 1960, subsequent to Alaska statehood, the DOI issued PLO 2215 which revoked PLO 82 as to the northern region of Alaska. 25 Fed. Reg. 12599 (1960).

Procedural History

In 1978, Solicitor Leo Krulitz addressed: (1) whether PLO 82 withdrew inland submerged lands; (2) if yes, whether the withdrawal prevented transfer of title to the submerged lands to Alaska at statehood; and (3) if so, whether revocation of PLO 82 in 1960 transferred ownership of the submerged lands to Alaska. See *The Effect of Public Land Order 82 on the Ownership of Coastal Submerged Lands in Northern Alaska*, M-36911, 86 Interior Dec. 151 (Dec. 12, 1978) (Krulitz Opinion). Solicitor Krulitz reached the following conclusion:

PLO 82 expressly reserved the submerged lands underlying inland navigable waters within the area it withdrew in northern Alaska, and . . . therefore such lands did not pass to the State of Alaska under the Alaska Statehood Act, by operation of the Submerged Lands Act, and did not pass to the State upon revocation of PLO 82.

Id. at 174-75.

Solicitor Krulitz based his conclusion on the following: (1) the United States' sovereign power over land in the territories included the power to reserve submerged lands to itself; (2) the phrase "public lands" in PLO 82 should be construed to encompass submerged lands; (3) the comprehensive language of PLO 82 implies the withdrawal of everything within the boundaries of the withdrawal, including submerged lands; (4) the purpose of PLO 82 was to protect oil resources from private interference during World War II; (5) PLO 82 expressly retained inland submerged lands at statehood pursuant to the Submerged Lands Act of 1953, 43 U.S.C. § 1302 *et seq.*; (6) the decision in *United States v. Holt State Bank*, 270 U.S. 49 (1926), that lands under navigable waters in territories are held by the United States and disposal "should not be regarded as intended unless the intention was definitely declared" *Id.* at 55; and (7) the revocation of PLO 82, nearly two years subsequent to statehood, did not transfer inland submerged lands to Alaska because the United States had expressly retained the inland submerged lands at the time of statehood pursuant to the Submerged Lands Act (SLA).¹¹

¹¹The significance of the Submerged Lands Act on the solicitor's opinion warrants further discussion. Ten years subsequent to promulgation of PLO 82, Congress enacted the Submerged Lands Act of 1953. The Submerged Lands Act granted to states title to land beneath inland navigable waters — SLA § 3 (a); 43 U.S.C. § 1311(a). The Alaska Statehood Act made the SLA applicable to Alaska. However, section 1313(a) of the Submerged Lands Act provided that [t]here is excepted from the operation of section 1311 of this title . . . all lands expressly retained by . . . the United States when the State entered the Union" *Id.* Solicitor Krulitz concluded that PLO 82 "expressly retained" the lands under inland navigable water and that title to such land did not pass to Alaska at statehood. According to the Solicitor, subsequent revocation of PLO 82 did not divest the United States of title to the inland submerged land because the section 1313(a) exception applied to Alaska at statehood, thus constituting "a permanent retention by the United States of those submerged lands." Krulitz Opinion at 174. The

In 1989, the State of Alaska filed a two-count amended complaint requesting that the court declare that PLO 82 did not defeat the State of Alaska's title to the beds of navigable waters. The complaint also seeks to quiet title in the State of Alaska to the bed on the Kukpowruk River. Additionally, the complaint requests injunctive relief requiring defendants, when claiming that a federal reservation of land prevented title of the beds of navigable water from vesting in the State of Alaska, to apply certain standards set forth in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987) (*Utah Lake*).¹²

In 1988, the Secretary of the Interior asked Solicitor Sansonetti to consider the impact of *Utah Lake* on the Krulitz Opinion. The parties in this suit agreed to a stay pending issuance of the solicitor's opinion. On April 20, 1992, Solicitor Sansonetti issued: *Ownership of Submerged Lands in Northern Alaska in Light of Utah Division of State Lands v. United States*, M-36911 (Supp. I) (April 20, 1992) (Sansonetti Opinion).¹³ The Sansonetti Opinion agreed with the Krulitz Opinion that title to the land beneath inland navigable waters in northern Alaska did not pass to Alaska at statehood. After Solicitor Sansonetti issued his opinion, the parties filed their respective motions for summary judgment in which they agreed that the court

Solicitor reasoned further that if title to certain submerged lands was not transferred to Alaska because of a section 1313(a) exception, "mere revocation of [PLO 82 in 1960] could not have automatically transferred title to the State." Krulitz Opinion at 174 (footnote omitted).

¹²The amended complaint also seeks certain relief regarding interim conveyances issued by the United States which purport to convey title to the bed of the Kukpowruk River and other submerged land. Clerk's Docket No. 50.

¹³Copy attached to affidavit of counsel regarding supporting documents, in support of plaintiff's motion for partial summary judgment (filed Nov. 2, 1992), Clerk's Docket No. 94; published at 100 Interior Dec. 103 (Apr. 20, 1992).

need only decide, at this point, whether title to the lands underlying navigable water in the PLO 82 area passed to the State of Alaska at statehood. Specifically, the cross-motions for summary judgment address only Count I of plaintiff's amended complaint in which the State of Alaska seeks to quiet title to itself to the bed of the Kukpowruk River.

To set the issues into proper context, the court will review *Utah Lake* and the Sansonetti Opinion.

Utah Lake

In *Utah Lake*, the Supreme Court considered "whether title to the bed of Utah Lake passed to the State of Utah under the equal footing doctrine upon Utah's admission to the Union in 1896. *Utah Lake*, 482 U.S. at 195. The equal footing doctrine is based upon the status of the original 13 states which, as successors to the English Crown, claimed title to land beneath navigable waters within their boundaries. "Because all subsequently admitted States enter the Union on an 'equal footing' with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union." *Id.* at 196 (citation omitted).

While a prospective state is still a territory, Congress, under the Property Clause of the Constitution¹⁴, has the power to make grants of submerged lands in any territory "to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to

¹⁴The Property Clause states:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other Property belonging to the United States

U.S. Const. art. IV, § 3 cl. 2.

the objects for which the United States hold the territory." *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). Thus, in the appropriate circumstances, Congress can defeat a prospective state's title to submerged land.

Utah Lake, however, did not involve a situation in which Congress granted title of territorial submerged land to a private party. Rather, pursuant to the Sundry Appropriations Act of 1888, Congress authorized the reservation of Utah Lake in the Territory of Utah as property of the United States.¹⁵ In 1896, Utah entered the Union "on an equal footing with the original States. *Utah Lake*, 482 U.S. at 200 (citations omitted).

In 1976, the DOI issued oil and gas leases for lands underlying Utah Lake. The State of Utah filed suit seeking a declaratory judgment that it, and not the United States, owned the lake bed. The district court found that title to the lake bed remained with the United States pursuant to the federal government's reservation of Utah Lake as a reservoir site in 1889.

In considering the issues, the Supreme Court discussed several principles of fundamental importance to the case at bar. "[N]othing in the Constitution . . . prevent[s] the Federal Government from defeating a State's title to land under navigable waters by its own reservation for a particular use . . . [however] the strong presumption is against finding an intent to defeat the State's title." *Id.* at 201. The Court noted that Congress was to hold submerged lands "for the ultimate benefit of future States" and that Congress

¹⁵ The Sundry Appropriations Act of 1888 authorized the United States Geological Service to select potential reservoir sites for irrigation purposes. The sites were to be "reserved from sale as the property of the United States, and shall not be subject . . . to entry, settlement, or occupation . . ." The 1890 Act repealed the 1888 Act, but that did not affect the status of lands already selected and reserved, including Utah Lake which had been reserved in 1889. *Utah Lake*, 482 U.S. at 198-99 (citation omitted).

would defeat a prospective state's entitlement to submerged land only "in exceptional instances." *Id.* (citation omitted). Accordingly, the Court stated "whether faced with a reservation or a conveyance, we simply cannot infer that Congress intended to defeat a future State's title to land under navigable waters 'unless the intention was definitely declared or otherwise made very plain.'" *Id.* at 201-202 (citation omitted).

A significant difference exists between a *reservation* of land and a *conveyance* of land. When Congress *conveys* submerged land, "of necessity it must also intend to defeat a future state's claim to the land." *Id.* at 202. Thus Congress' intent to defeat state title to submerged land is made plain through the act of conveyance. *Reservation* of land, however, may not evince an intent to defeat a prospective state's claim; the land remains in federal control and "may still be held for the ultimate benefit of future States." *Id.* at 201 (citation omitted). For example, in *Montana v. United States*, 450 U.S. 544 (1981), the Court considered whether Congress intended to permit the State of Montana to take title to the bed of the Big Horn River at statehood, even though the Big Horn flows through the Crow Indian Reservation. Although various treaties between the United States and the tribe established the Crow Indian Reservation boundaries, nothing in the treaties overcame. The strong "presumption against the sovereign's conveyance of the riverbed." *Montana*, 450 U.S. at 554. The treaties presented no public exigency requiring Congress to depart from the policy of reserving ownership of submerged lands for a prospective state. Thus, in *Montana*, Congress intended for the state to take title of the bed of the navigable river at statehood, even though the land through which the Big Horn flows was reserved for the Crow Tribe."¹⁶

¹⁶In *Montana*, the court stated:

Similarly, in *United States v. Holt State Bank*, 270 U.S. 49 (1925), the Supreme Court rejected an Indian tribe's claim to title to the bed of a navigable lake which lay within the boundaries of the Red Lake Indian Reservation in Minnesota. The Court held that although certain land was reserved as a permanent home for the Indians pursuant to treaties, nothing in the treaties "approache[d] a grant of rights in lands underlying navigable waters . . . nor . . . evince[d] a purpose to depart from the established policy . . . of treating [submerged] lands as held for the benefit of the future State". *Id.* at 58-59.¹⁷ In the Court's opinion,

A court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance unless the intention was definitely declared or otherwise made plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the water of the stream.

Montana, 450 U.S. at 552 (citations and internal quotation marks omitted). The phrase "confirmed in terms embraces the land" is rather awkward, and may have made more sense when it was written in 1891 in *Packer v. Bird*, 137 U.S. 661, 672 (1891). From the manner in which succeeding cases interpret the phrase, it is obvious that the terms of a land claim must "embrace[] the land under the waters of the stream" in order to defeat the strong presumption against conveyance by the United States.

¹⁷ *Holt* reiterated the policy set out in *Shively*:

[T]he United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

Holt, 279 U.S. 55.

the creation of the Red Lake Indian Reservation did not "operate[] as a disposal of the lands under . . . navigable waters within [the reservation] limits . . ." *Id.* at 58. Consequently, title to the submerged lands passed to Minnesota at statehood.¹⁸

Based on its previous decisions in *Shively*, *Montana*, and *Holt State Bank*, the Court in *Utah Lake* set forth a dual inquiry for determining whether a reservation of land could defeat a prospective state's title to submerged land. The Court explained as follows:

Given the longstanding policy of holding land under navigable waters for the ultimate benefit of the States . . . we would not infer an intent to defeat a State's equal footing entitlement from the mere act, of reservation itself. Assuming, *arguendo*, [sic] that a reservation of land could be effective to overcome the strong presumption against the defeat of state title, the United States would not merely be required to [1] establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to [2] establish that Congress affirmatively intended to defeat the future State's title to such land.

Utah Lake, 482 U.S. at 202.

¹⁸ The meaning of "reservation" at issue in *Utah Lake* is legally different from the meaning of "reservation" in *Montana* and *Holt State Bank*. In the latter two cases, "reservation" referred to the creation of Indian title, while in *Utah Lake*, "reservation" referred to land reserved for the United States. Thus, in *Utah Lake*, the Court stated that "we have never decided whether Congress may defeat a State's claim to title by a federal reservation or withdrawal of land under navigable waters." *Utah Lake*, 482 U.S. at 200. The distinction is discussed in greater detail in *Coeur D'Alene Tribe of Idaho v. State of Idaho*, 42 F.3d 1244, 1256 (9th Cir. 1994).

In applying the first part of the two part test, the *Utah Lake* court found that the United States failed to establish that Congress intended to reserve the bed of Utah Lake in either the 1888 or 1890 Act. Regarding the 1888 Act, the Court noted that the Act reserved certain lands "from sale as the property of the United States" such that the land was not subject "to entry, settlement, or occupation until further provided by law." *Id.* at 203 (citation omitted). However, the 1888 Act did not reserve submerged lands because those lands "were *already* the property of the United States and *already* exempt from sale, settlement, or occupation. . . ." *Id.* at 203. Thus, "little purpose would have been served by the reservation of the bed of Utah Lake." *Id.*¹⁹

The Court also found that the 1890 Act did not reserve the bed of Utah Lake. The 1890 Act repealed the 1888 Act, but in doing so it specifically reserved from entry or settlement previously selected reservoir sites, including Utah Lake. Nonetheless, the Court found that Congress, in enacting the 1890 Act, did not reserve the bed of Utah Lake. The Court specifically stated that the "scattered references to the bed of Utah Lake in the material submitted to Congress . . . presents no unambiguous evidence that Members of Congress actually understood these references as pointing to a reservation of the bed of Utah Lake." *Id.* at 207. The Court concluded by stating that "the 1890 Act no more definitely declared or otherwise made very plain Congress' intent to reserve Utah Lake than had the 1888 Act. *Id.* (citations and internal quotation marks omitted). Accord-

¹⁹The Court advanced another reason as to why the lake bed had not been reserved. The Court referred to a proviso in the 1888 Act which permitted the President to open *any* land reserved to settlement. The Court stated that it was "inconceivable that Congress intended by this simple proviso to abandon its long-held and unyielding policy of never permitting the sale or settlement of land under navigable waters" *Utah Lake*, 482 U.S. at 204 (citation omitted).

ingly, the United States failed to meet the first part of the *Utah Lake* test.

Even if the United States did intend to reserve the bed of Utah Lake, thus satisfying the first part of the test, the Court found that neither the 1888 nor 1890 Act clearly expressed congressional intent to defeat Utah's claim to the lake bed under the equal footing doctrine. The 1888 Act merely provided that the reserved land was reserved from sale and not subject to settlement or occupation; it did not mention Utah's entitlement to land beneath navigable rivers and lakes at statehood. *Id.* at 208. The Court stated that "the broad sweep of the 1888 Act cannot be reconciled with an intent to defeat the States' title to the land under navigable waters." *Id.* The Court stated further that defeating the State's title to the bed of Utah Lake in the absence of "international duty [or] public exigency . . . would be wholly at odds with Congress' policy of holding this land for the ultimate benefit of the future States." *Id.* at 208-09 (citation and internal quotation omitted). The Court concluded:

Congress did not definitely declare or otherwise make very plain either its intention to reserve the bed of Utah Lake or to defeat Utah's title to the bed under the equal footing doctrine. Accordingly, we hold that the bed of Utah Lake passed to Utah upon that State's entry into statehood on January 4, 1896.

Id. at 209.²⁰

²⁰The only case in which the Supreme Court found that Congress intended to grant the bed of a navigable river to a private party was *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). *Choctaw* is cited as the "singular exception", "based on very peculiar circumstances [and] the unusual history of the treaties there at issue [.]". *Montana*, 450 U.S. at 555 n.5. The circumstances included a series of broken treaties and forced relocation of the Cherokee and Choctaw farther and farther west. Eventually, land west of the Arkansas Territory was conveyed to the

The Sansonetti Opinion

The Sansonetti Opinion contains an exhaustive review of the facts and law applicable to PLO 82, much of which this court has already discussed. Accordingly, the court need only highlight the Sansonetti opinion's major points. The Sansonetti Opinion concluded that the *Utah Lake* test applied to PLO 82. This is significant because PLO 82 involves a *reservation* of land, and *Utah Lake* did *not* answer the question of whether a reservation of land could defeat a prospective state's title to submerged land. Although *Utah Lake* discussed the issue in detail, the Court stated that "[w]e need not decide that question today . . . because . . . a reservation of the bed of Utah Lake was not accomplished on these facts. *Id.* at 201. The Court set out the two-part test only after [a]ssuming, *arguendo*, that a *reservation* of land could be effective to overcome the strong presumption against the defeat of state title" *Id.* at 202 (emphasis added).

The Sansonetti Opinion next discussed whether the *Executive* withdrawal accomplished by PLO 82 could satisfy the test. The *Utah Lake* test, of course, asked whether *Congress* intended to include submerged land in an expressly authorized federal reservation and whether *Congress* intended to defeat state title to such land. PLO 82, on the other hand, was an *Executive* withdrawal by the Secretary of the Interior pursuant to authority from President Roosevelt. The Sansonetti Opinion noted, however, that the Executive Branch acted as the agent of Congress in exercising its constitutional authority over the public domain. *United States v. Midwest Oil Co.*, 236 U.S. 459, 471-75 (1915). The San-

Choctaw Nation in fee simple. Relevant treaties promised that *no part* of reservation lands would ever become part of any state. The Cherokee signed similar treaties. Such circumstances had no counterpart in the Crow treaties at issue in *Montana*.

sonetti Opinion then analyzed the Executive's intent at the time of the issuance of PLO 82.

The Sansonetti Opinion concluded that PLO 82 satisfied the first part of the *Utah Lake* test (clear intent to include submerged land within the federal reservation) for three reasons. First, PLO 82 was "all-inclusive" in withdrawing "all that part of Alaska north of the Brooks Range and the De Long Mountains, including the watershed northward to the Arctic Ocean" Sansonetti Opinion at 31 (citation and internal quotations omitted). Additionally, a contemporaneous map of the withdrawal area did not exclude any bodies of water or submerged land.

Second, the Sansonetti Opinion stated that "PLO 82's reference to 'public lands' was consistent with an intent to withdraw submerged lands" because reserving the submerged lands furthered the purpose of the withdrawal.²¹ Sansonetti Opinion at 31. The Sansonetti Opinion cited *Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 87, which suggested that a withdrawal of "Public lands" could, depending upon the withdrawal's purpose, include submerged lands.²²

²¹ In *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970), the court stated "the courts have consistently held that the words 'public domain', 'public lands' and 'land', include land under water." *Id.* at 766 (citing: *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918); and *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949)).

²² In *Alaska Pac. Fisheries*, the Court considered whether Congress' withdrawal of "the body of lands known as Annette Islands" for the Metlakatla Indians included waters overlying coastal submerged lands. *Alaska Pac. Fisheries*, 248 U.S. at 87. "The principal question for decision [was] whether the reservation created by the Act of 1891 embrace[d] only the upland of the islands or include[d] as well the adjacent waters and submerged land." *Id.* In answering the question, the Court considered the "purpose of creating the reservation". *Id.* at 89. That purpose was to provide for the needs of the Metlakatla who were

Third, the Sansonetti Opinion stated that the purpose of PLO 82 was to protect oil and gas resources for the prosecution of World War II. The Sansonetti Opinion stated that failing to reserve the submerged lands would have been illogical and incompatible with PLO 82's purpose, because it would have left some of the most productive areas available for private development.²³

For these reasons, the Sansonetti Opinion concluded that PLO 82 clearly intended to include submerged lands, thus satisfying the first part of the *Utah Lake* test.

The Sansonetti Opinion then considered whether PLO 82 satisfied the second part of the *Utah Lake* test (whether Congress affirmatively intended to defeat Alaska's title to the submerged land at statehood). The Sansonetti Opinion noted that at the time PLO 82 was issued in 1943, Alaska statehood was not imminent and nothing in PLO 82 purported to defeat Alaska's equal footing entitlement to the submerged lands of PLO 82.²⁴ Accordingly, the Sansonetti opinion concluded that PLO 82 did not meet the second prong of the *Utah Lake* test in 1943. Consequently, the Sansonetti Opinion considered whether the Executive or

fishermen. Accordingly, the Court concluded that Congress, in reserving the Annette Islands as a single body, intended to reserve the surrounding waters as well. "That Congress had the power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement". *Id.* at 87.

²³The Sansonetti Opinion contrasted PLO 82's purpose with the reservation of *Utah Lake*. The purpose of reserving Utah Lake was to protect an irrigation reservoir; this purpose could be accomplished without reserving the lakebed. However, the purpose of PLO 82, protecting oil resources, could not be met without reserving the submerged land.

²⁴Had statehood been imminent, given the public exigency of protecting petroleum resources for the prosecution of World War II, the Sansonetti Opinion "would conclude as a necessary inference flowing from the purpose of the withdrawal, that inland submerged lands were intended to be retained in federal ownership." Sansonetti Opinion at 34.

Congress, subsequent to the issuance of PLO 82 but prior to statehood, evinced a clear intent to withhold the submerged lands from Alaska. Sansonetti's review of congressional and executive actions during the years following the issuance of PLO 82 was extensive, but can be summarized with reference to certain conclusions drawn in the opinion.

The Sansonetti Opinion stated:

The Executive intended to defeat the future state's title to submerged lands within the boundaries of NPR-4 and the proposed boundaries of the Arctic National Wildlife Range . . . and Congress affirmed this executive intent in the Alaska Statehood Act.²⁵

Sansonetti Opinion at 80.

In supporting the above conclusion, the Sansonetti Opinion considered PLO 1621, which issued on April 18, 1958. PLO 1621 modified PLO 82 by permitting locations and entries under the mining laws and the issuance of mineral leases certain areas of PLO 82.²⁶ PLO 1621 continued to bar entry into NPR-4 and set aside several million acres of

²⁵NPR refers to Naval Petroleum Reserve. The United States Navy controlled petroleum reserves of approximately 23,000,000 acres lying within PLO 82 and obviously including submerged land. In 1954 the Navy indicated that it would not object to the revocation of PLO 82 so long as NPR-4 was specifically exempt. In 1955, the DOI asked the Chairman of the House Armed Services Committee for his views on the revocation of PLO 82. The Chairman "expressed his satisfaction . . . that Interior would leave intact NPR-4. Sansonetti Opinion at 44 (footnote omitted). The Arctic National Wildlife Range was redesignated as the Arctic National Wildlife Refuge pursuant to the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 668dd note.

²⁶The areas opened to mining and mineral leasing included the area west of NPR-4 and an area between the Canning and Volville Rivers. The Kukpowruk River lies within the opened area west of NPR-4.

PLO 82 for the proposed Arctic National Wildlife Range (ANWR). According to the Sansonetti opinion:

By specifically citing NPR-4 and the withdrawal application for the Arctic National Wildlife Range in PLO 1621, the Executive Branch enhanced the underlying protection provided by PLO 82 by plainly demonstrating the goal of retaining ANWR and NPR-4 in federal ownership. Furthermore, PLO 1621 did not revoke any prior orders, but rather was a modification of PLO 82. Thus, the modification left in place prior withdrawals such as PLO 82.

Sansonetti Opinion at 45.

At this point in its analysis the Sansonetti Opinion considered events relevant to PLO 82 which occurred *after* statehood. On December 6, 1960, the DOI established ANWR pursuant to PLO 2214, 25 Fed. Reg., 12598 (December 6, 1960). Approximately 9,000,000 acres were set aside for ANWR "subject to valid existing rights, and the provisions of any existing withdrawals [e.g., PLO 82]." Sansonetti Opinion at 47 (citation omitted).

On the same day that the DOI established ANWR, it revoked PLO 82 by PLO 2215. 25 Fed. Reg. 12599 (1960). Although PLO 82 was revoked with respect to the 48,800,000 acres originally withdrawn in northern Alaska by PLO 82, previous NPR-4 withdrawals within PLO 82 were preserved. Thus, the 23,000,000 acres of NPR-4 were not affected by the opening provided in PLO 2215. Another 5,000,000 acres were "segregated" from all forms of disposal under the public land laws . . . " for use as ANWR. Sansonetti Opinion at 48. *Id.* According to the Sansonetti Opinion, "[s]ubmerged lands were included within ANWR

and NPR-4 by 'necessary implication.' "²⁷ Sansonetti Opinion at 48 (citing *United States v. State of Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970); *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971)). *See infra*, pp. 36-38.

Returning to pre-statehood events, and specifically regarding NPR-4, the Sansonetti Opinion found that the Executive clearly intended to reserve the area at statehood to ensure military access to the petroleum resources. The Sansonetti Opinion stated that transfer of submerged lands in NPR-4 would have frustrated any federal oil and gas program.

The Sansonetti Opinion also addressed congressional intent to defeat state title to submerged lands in NPR-4 and ANWR. The Sansonetti Opinion concluded that congressional intent regarding NPR-4 and ANWR was manifested in section 6(e) of the ASA. Section 6(e) of the ASA excepted from transfer of real property to Alaska "lands withdrawn or otherwise set apart as refugees [sic] or reservations for the protection of wildlife" *Id.*²⁸ The Sansonetti Opinion elaborated as follows:

The ANWR lands were clearly set apart (*i.e.*, segregated) as a refuge or reservation for wildlife. As such the lands were specifically withheld by section 6(e) from being transferred to the State of Alaska under the

²⁷The Kukpowruk River is located outside the boundaries of ANWR and NPR-4. *See* United States' memorandum in support of motion at 48, n.12.

²⁸Section 6(e) of the ASA provides in part:

All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife . . . shall be transferred and conveyed to the State of Alaska . . . *Provided*, That such transfer shall not include lands withdrawn or otherwise set apart as refuges reservations for the protection of wildlife

equal footing doctrine because they were lands "otherwise set apart as reservations the protection of wildlife." Furthermore, I view the earlier withdrawal status provided by PLO 82, in addition to the segregative effect of PLO 1621 to preserve this area as a wildlife refuge as meeting the second prong of the *Utah Lake* test. Thus, section 6(e) established the affirmative intent to defeat the equal footing doctrine with respect to the submerged lands for ANWR.

Sansonetti Opinion at 49 (citation and footnote omitted).²⁹

Regarding congressional intent with respect to submerged lands in NPR-4, the Sansonetti Opinion noted that section 11(b) of the ASA expressly withheld NPR-4 from the State of Alaska.³⁰ The Sansonetti Opinion stated that "[n]either ANWR nor NPR-4 could be administered and preserved for their primary purposes absent the inclusion of

²⁹The Izembek National Wildlife Range was established on December 6, 1960; submerged land was not included. The Kuskokwim Wildlife Range was created on December 7, 1960, and did not include submerged land. ANWR was also established on December 7, 1960, and did not concede state ownership to submerged land. According to the Sansonetti Opinion, the exclusion of submerged lands in the Izembek and Kuskokwim Wildlife Ranges, but failure to mention submerged lands in the creation of ANWR, "demonstrates that the [DOI] considered the underlying withdrawal of PLO 82 on its own as sufficient to withhold the submerged lands within the PLO 82 area from transfer to the State." Sansonetti Opinion at 50.

³⁰Section 11(b) of the ASA states in pertinent part:

Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress . . . of exclusive legislation . . . in all cases whatsoever over such tracts or parcels of land as, immediately prior to admission of said State, are owned by the United States and held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4. . . .

submerged lands." Sansonetti Opinion at 52. The Sansonetti Opinion stated further that the ASA and its legislative history establishes that Congress clearly intended to defeat state title to submerged lands in ANWR and NPR-4.

The Sansonetti Opinion next reached the following conclusion:

The Executive took no official action prior to Alaska Statehood on January 3, 1959, to delete from reserved status those inland submerged lands that lay within the boundaries of the PLO 82 withdrawal, but outside of NPR-4 and the proposed Arctic National Wildlife Range.

Sansonetti Opinion at 80.

The Sansonetti Opinion recognized that PLO 1621 amended PLO 82 to permit mining and mineral leasing, under supervision of the DOI, in two areas of PLO 82.³¹ The Sansonetti Opinion did not consider this action to be inconsistent with holding the land for military purposes and with Congress' action in the ASA in reserving jurisdiction over the lands.

The Sansonetti Opinion also noted that the DOI considered the land of PLO 82 to be intact at statehood. A DOI memorandum to the White House of July 4, 1958, stated:

Naval Petroleum Reserve No. 4 and the area covered by Public Land Order 82 — areas already under the exclusive control of the Federal Government — contain about 48,800,000 acres. PLO 82 lands were opened to mineral entry, only, on April 16, 1958. No homesteading or other entry under the public land laws is permitted in either of these areas at the present time.

Sansonetti Opinion at 54 (citation omitted).

³¹As noted above, the Kukpowruk River is located in one of two areas opened by PLO 1621.

The Sansonetti Opinion stated that the modification, rather than revocation, of PLO 82 by PLO 1621 implies that ownership of the land would not change at statehood. Yet the Sansonetti Opinion did not consider this sufficient to meet the second part of the *Utah Lake* test. Accordingly, the Sansonetti opinion examined the ASA "to determine whether there existed an affirmative intent to defeat state title to the remainder of the submerged lands within PLO 82." Sansonetti Opinion at 55.

In addressing the above issue, the Sansonetti Opinion noted that Congress did not address the Utah Lake withdrawal in the Utah Statehood Act. In the ASA, however, Congress addressed which lands would pass to the state. The Sansonetti Opinion then reviewed relevant sections of the ASA.

In section 4 of the ASA, Alaska agreed to disclaim right and title to land not granted to the state which was held by the United States. Section 5 provided that the United States would retain title to all land to which it had title "[e]xcept as provided in section 6" Section 6 of the ASA makes provision for extensive land grants to the State of Alaska, and section 6(m) made the Submerged Lands Act applicable in the State of Alaska.

The Submerged Lands Act (SLA) codified the "equal footing" doctrine and provided that states were to take title to submerged lands beneath inland navigable waters and the marginal sea. 43 U.S.C. § 1312. The SLA was not without exceptions. The relevant exception in this case is set out in section 5(a) of the SLA. Section 5(a) states:

There is excepted from the operational of section 1311 of this title —

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from

any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; *all lands expressly retained by or ceded to the United States when the State entered the Union* (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchases, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right[.]

SLA § 5(a); 43 U.S.C. § 1313(a) (emphasis added).³²

³²Of additional significance is the creation in ASA section 10(b) of the "PYK Line," so named because the line followed generally the Porcupine, Yukon, and Kuskokwim Rivers. The "PYK Line" delineates an area from which the President of the United States may make "special national defense withdrawals . . ." ASA § 10(a).

Section 10(b) authorized:

Special national defense withdrawals . . . shall be confined to those portions of Alaska that are situated to the north or west of the following line: Beginning at the point where the Porcupine River crosses the international boundary between Alaska and Canada; thence along a line parallel to, and five miles from, the right bank of the main channel of the Porcupine River to its confluence with the Yukon River; thence along a line parallel to, and five miles from, the right bank of the main channel of the Yukon River to its most southerly point of intersection with the meridian of longitude 160 degrees west of Greenwich; thence south to the intersection of said meridian with the Kuskokwim River; thence along a line parallel to, and five miles from the right bank of the Kuskokwim River to the mouth of said river; thence along the shoreline of Kuskokwim Bay to its intersection with the meridian of longitude 16 degrees 30 minutes west of Greenwich; thence south to the intersection of said meridian with the parallel of latitude 57 degrees 30 minutes north;

The Sansonetti Opinion summarized its discussion of the SLA and the ASA by noting that the ASA applied the SLA to Alaska, and the SLA excepted from its grant of submerged lands to Alaska that land "expressly retained by or ceded to the United States when the State entered the Union" Sansonetti Opinion at 63 (citation omitted).³³

Having determined that the ASA applied the SLA to Alaska, the Sansonetti Opinion then considered whether congressional intent regarding PLO 82 could be gleaned from Alaska statehood proceedings before Congress. Not all of the salient points of the Senate and House debates need be repeated here. It is sufficient to note that according to the Sansonetti Opinion, both houses of Congress clearly understood that PLO 82 was an oil reserve that would remain under federal control at statehood.³⁴

The Sansonetti Opinion concluded with an in-depth analysis of ASA section 11(b) which "makes plain Congress' intent to defeat state title to submerged lands which immediately prior to Statehood were owned by the United States

thence east to the intersection of said parallel with the meridian of longitude 156 degrees west of Greenwich; thence south to the intersection of said meridian with the parallel of latitude 50 degrees north.

PLO 82 lies above the PYK Line and is in the area where Alaska could not select land "without approval of the President". ASA § 6(b). The PYK Line was reaffirmed by Congress in 1980 in the Alaska National Interest Lands Conservation Act ANILCA, 43 U.S.C. § 1635(p).

³³In *Utah Lake*, the Court found that a reservation of Utah Lake had not occurred; therefore, the Court did not need to consider the SLA.

³⁴Senator Jackson stated that the "northern portion of Alaska . . . is an oil reserve . . . the middle area is naval and the western and eastern portions . . . are under Public Land Order 82." Sansonetti opinion at 65 (citation omitted). Senator Cordon stated that "the petroleum reserve is a good reason not to grant the land in that area to the State of Alaska . . ." *Id.* at 66 (citation omitted). Senator Cordon added "[t]he reservation there [PLO 82] is absolute." *Id.* at 66 (citation omitted).

and held for military purposes." Sansonetti Opinion at 70. Section 11(b) states as follows:

*Notwithstanding the admission of the State of Alaska into the Union, authority is reserved in the United States, subject to the proviso hereinafter set forth, for the exercise by the Congress of the United States of the power of exclusive legislation, as provided by article I, section 8, clause 17, of the Constitution of the United States, in all cases whatsoever over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States and held for military, naval, Air Force, or Coast Guard purposes, including naval petroleum reserve numbered 4, whether such lands were acquired by cession and transferred to the United States by Russia and set aside by Act of Congress or by Executive order or proclamation of the President or the Governor of Alaska for the use of the United States, or were acquired by the United States by purchase, condemnation, donation, exchange, or otherwise: Provided . . . (iii) that such power of exclusive legislation shall rest and remain in the United States only so long as the particular tract or parcel of land involved is owned by the United States and used for military, naval, Air Force, or Coast Guard purposes.*³⁵

ASA § 11(b) (emphasis added).

The Sansonetti Opinion noted that the lands in PLO 82 were owned by the United States immediately prior to statehood. The Sansonetti Opinion further stated that the phrase in section 11(b) "[n]otwithstanding the admission

³⁵Proviso (i) of section 11(b) allows the State of Alaska to pursue criminals and serve civil process within reserved areas. Proviso (ii) establishes that the reserved lands are still considered a part of the State of Alaska.

of the State of Alaska into the Union" means that the impact of statehood and the equal footing doctrine are not to be considered with land subject to section 11(b).

Additionally, the Sansonetti Opinion stated that PLO 82 was a withdrawal for prosecution of World War II, was in effect at statehood, and held land for military purposes. "Therefore, the submerged lands within PLO 82 meet the requirements of section 11(b) that (1) immediately prior to admission of the State they were owned by the United States and (2) immediately prior to the admission of the State they were held for military purposes." Sansonetti Opinion at 72.³⁶

The Sansonetti Opinion indicated that the third proviso of section 11(b) was "exceedingly important." Sansonetti Opinion at 75. As noted above, proviso (iii) terminates exclusive jurisdiction of section 11(b) lands only when the lands are no longer owned by the United States and used for military purposes. The Sansonetti Opinion reasoned that proviso (iii) "makes plain Congress' intent to defeat state title to submerged lands within lands held for military purposes." *Id.* at 75-76. According to the Sansonetti Opinion, the first sentence of section 11(b) includes submerged lands because it refers to land held for military purposes, such as PLO 82. Therefore, submerged lands must be included in proviso (iii) if the military purpose of proviso (iii) is to be read consistently with the rest of section 11(b).³⁷

³⁶ Additionally, according to the Sansonetti Opinion, the lands of PLO 82 were acquired by cession and transfer to the United States by Russia and set aside by Executive order, as specified by section 11(b).

³⁷ A "basic rule of statutory construction is that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless." *Hughes Air Corp. v. Pub. Util. Comm'n.*, 644 F.2d 1334, 1338 (9th Cir. 1981) (citations omitted).

The Sansonetti opinion offered other reasons why section 11(b) defeated state title to submerged lands at statehood: (1) Congress did not want state laws, such as state leasing requirements, to interfere with the military purposes of reserved lands; (2) exclusive jurisdiction under section 11(b) lands attaches only as long as the land is owned by the United States and used for military purposes; therefore, section 11(b) must have defeated state title at statehood or exclusive jurisdiction would have been impossible on submerged land held for military purposes; and (3) if section 11(b) did not defeat state title to submerged lands, then the United States would have had to compensate the State of Alaska to use the submerged lands for military purposes.³⁸

The Sansonetti Opinion also considered the impact of ASA section 10 on section 11(b). Section 10 authorizes the President to make post-statehood national defense withdrawals north and west of the PYK Line. Section 11(b), on the other hand, reserved the power of exclusive jurisdiction in the United States over lands held for military purposes immediately prior to statehood. Section 10 did not address submerged lands and, according to the Sansonetti Opinion, was not intended to "restore" title to the United States to submerged lands. The Sansonetti Opinion reasoned that Congress defeated state title to submerged lands in section 11(b) so that it would not have to compensate the state for use of submerged lands in the event of a section 10(b) special defense withdrawal (PYK Line withdrawal).³⁹

³⁸ The Sansonetti Opinion stated that "[f]loor discussions demonstrate that Congress had no intention of paying for the acquisition of lands in northern Alaska for military purposes." Sansonetti Opinion at 77 (footnote omitted).

³⁹ The Sansonetti Opinion also reasoned that if section 11(b) did not defeat state title to submerged land reserved for military purposes north and west of the PYK Line, it would not have defeated state title to submerged land reserved for military purposes south and east of the

Finally, the Sansonetti Opinion considered the relationship between the SLA and ASA section 11(b). Section 5(a) of the SLA prohibits granting submerged land title to states if those lands were expressly retained by the United States when the state entered the Union. According to the Sansonetti Opinion, section 11(b) of the ASA constituted an express retention of submerged lands within the meaning of SLA section 5(a). Therefore, such land would not have passed to Alaska under the land grant provisions of the SLA. For all the above reasons, the Sansonetti Opinion concluded that:

[T]he federal withdrawal and retention of lands under inland navigable waters within the boundaries of PLO 82 in northern Alaska met the two-pronged test set out in *Utah Lake*: (1) Inland submerged lands were included in the withdrawal at its creation in 1943 and remained in the withdrawal through the moment of Alaska statehood; and (2) Congress affirmatively intended in the Alaska Statehood Act to defeat Alaska's title to the submerged lands within PLO 82.

Sansonetti Opinion at 81.

The Cross-Motions for Summary Judgment

The background of this case having been discussed, the court will now consider the arguments raised in the cross-motions for summary judgment. Before reaching the *Utah Lake* test, the court will first consider whether the equal footing doctrine prevents Congress or the Executive from reserving submerged land to the United States, thereby defeating a prospective state's title to that land.

PYK Line. According to the Sansonetti Opinion, this would result in severe constraints on military activity centered in military bases located south and east of the PYK Line. "This awkward result makes very plain that Congress intended in section 11(b) to defeat state title to submerged lands in areas held for military purposes, including PLO 82." Sansonetti Opinion at 79.

No court has specifically addressed whether a congressional or executive reservation of submerged land may defeat state title to that land. *Utah Lake* only assumed, *arguendo*, that a congressional reservation of land could overcome the strong presumption against defeat of state title. *Utah Lake*, 482 U.S. at 202.

As previously noted, the equal footing doctrine provides that "[u]pon admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce." *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Shively*, 152 U.S. at 26-28; *Holt*, 270 U.S. at 55. At statehood, title passes automatically from the United States, as trustee, to the new state. *Arizona v. California*, 373 U.S. 546, 597 (1963).

The automatic transfer of title to submerged lands will not occur where Congress has made a conveyance to a third party prior to statehood. *Utah Lake*, 482 U.S. at 196-97. Although a conveyance of land to a third party necessarily defeats State title, a reservation of land to the United States does not necessarily evince an intent to defeat State title. The land could still be held for the future state.

The State of Alaska argues that the United States cannot constitutionally reserve land to itself, as this would violate the equal footing doctrine. The United States argues that the Supreme Court did address the question in two cases known as the *Annette Island* cases. In 1891 Congress created the Annette Islands reservation for the Metlakatla Indians. The pertinent act set aside "the body of land known as the Annette Islands" for the Indians. *Alaska Pac. Fisheries*, 248 U.S. 78, 87 (1918) (citation omitted). In 1916, Alaska Pacific Fisheries erected a fish trap on the sub-

merged lands surrounding the island 600 feet from the high tide land. The United States sued to remove the fish trap.

The principal question for decision (was) whether the reservation created by the Act of 1891 embrace(d) only the upland of the islands or include[d] as well the adjacent waters and submerged land. The question [was] one of construction — of determining what Congress intended by the words “the body of lands known as Annette Islands.”

Id. at 87.

The Court determined that:

Congress had power to make the reservation inclusive of the adjacent waters and submerged land. . . . All were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority. The reservation was not in the nature of a private grant, but simply a setting apart . . . of designated public property for a recognized public purpose

Id. at 87-88 (citations omitted).

The Court concluded by stating that the reservation included the surrounding waters as well as the uplands and that the Metlakatla were “the only persons to whom permits may be issued for erecting salmon traps at these islands.” *Id.* at 90.

Subsequent to statehood, the Supreme Court considered the Annette Islands reservation again in *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). In *Metlakatla*, the Indians filed for an injunction against interference by the State of Alaska with the Indian’s use of fish traps in water surrounding Annette Island. Neither title to submerged land nor the equal footing doctrine were mentioned in *Metlakatla*. Rather, the case was decided on the basis of

whether the State of Alaska or the DOI, pursuant to the 1891 Act which set apart the reservation, controlled fishing adjacent to Annette Island.⁴⁰ The case was remanded to the Alaska Supreme Court where the DOI could determine what authority it would exercise regarding fishing rights. Although *Alaska Pac. Fisheries* discussed federal reservations of submerged lands, that case, along with *Metlakatla*, were ultimately fishing rights cases. This court concludes that in the *Annette Island* cases the Supreme Court did not decide whether Congress could reserve land to itself without violating the equal footing doctrine.

The United States argues that even if the Supreme Court has not decided whether Congress can reserve submerged lands to itself, the Ninth Circuit has decided the issue. In *United States v. State of Alaska*, 423 F.2d 764 (9th Cir.), cert. denied, 400 U.S. 967 (1970), the court considered an action to quiet title to lands under Tustumena Lake, located in the Kenai Moose Range in Alaska.

The Kenai Moose Range was established by Executive order in 1941 to protect the Kenai moose. After oil was discovered on the Kenai Peninsula, the southern half of the Kenai Moose Range was closed to leasing. The court stated that upon considering the “factual atmosphere in which the Kenai Moose Range was created”, the withdrawal order clearly included land under navigable water. *Id.* at 766-67. Moose are semi-aquatic; therefore, water and submerged lands are essential to the continued existence of the “bulls and cows of this noble group” *Id.* at 767. The court held that the equal footing doctrine notwithstanding, the United States, while holding Alaska as a territory, had sovereign power to reserve land to itself which might otherwise go to a state on its admission to the Union. *Id.* at 767-68, (citing

⁴⁰The 1891 Act stated that the Metlakatla Indians could use the Annette Islands pursuant to rules and regulations prescribed by the Secretary of Interior. *Metlakatla*, 369 U.S. at 44.

United States v. Holt State Bank, 270 U.S. 49 (1926); *Shively v. Bowlby*, 152 U.S. 1 (1894)).

Similarly, in *United States v. City of Anchorage*, 437 F.2d 1081 (9th Cir. 1971), the court considered an action to quiet title to certain tidelands and submerged lands near the Alaska Railroad's terminal reserve land in Anchorage. The Alaska Railroad was created pursuant to congressional authorization by Executive order in 1915. In quieting title, the court considered issues similar to those at issue here:

(1) [W]hether the Alaska Railroad Act, as implemented by the Presidential Order of August 31, 1915, reserved for use of the Alaska Railroad as a terminal, by necessary implication, the tide and submerged lands immediately adjacent to and contiguous with the ordinary highwater mark on the eastern shore of Knik Arm and also the tidelands and bed of Ship Creek within the exterior boundaries of the terminal reserve; and (2) whether title to these lands remained in the United States after the admission of Alaska into the Union on January 3, 1959.

Id. at 1083.

The court held that both Congress and the President intended to reserve the land in question because construction of docks, wharves, and harbor facilities on the submerged land was essential to connect ocean-going transportation to the railhead and, therefore, essential to the development of Alaska. The court held that the second question was "of necessity, resolved against [the state] in our disposition of the first point and by our decision in *United States v. State of Alaska*. . . ." *Id.* at 1085. The court stated further:

The establishment of the Alaska Railroad was one of those "exceptional circumstances" falling within the exception to the general rule stated in *United States v. Holt State Bank*, 270 U.S. 49, 55 . . . (1926) and

Shively v. Bowlby, 152 U.S. 1, 49-50 . . . (1894). Beyond question, the establishment of the railroad was a "public exigency", as that phrase was used in those cases.

437 F.2d at 1085.

Accordingly, the court quieted title in the United States to the tidelands and submerged lands. *See also Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1406 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) ("The federal government has the power to convey a Territory's lands underlying navigable waters prior to that Territory becoming a State, thereby defeating the future State's right to the lands. The Government could probably likewise reserve unto itself the same lands prior to statehood.") (citations omitted).

The *Utah Lake* dissent⁴¹ expressed "confiden[ce] that Congress has the power to prevent ownership of land underlying a navigable water from passing to a new State by reserving the land to itself for an appropriate public purpose" 482 U.S. at 209. The dissent stated further that "there is no reason to distinguish between a conveyance to a third party required for an appropriate public purpose and a reservation unto the United States for the same purpose." *Id.* at 210. The dissent regarded reservations to be more constitutionally permissible than conveyances because "if Congress later determines that the lands are no longer needed by the Federal Government for a public purpose, it can at that time transfer title to the State." *Id.* at 210.

Although the Supreme Court has not specifically held that Congress may defeat a state's claim to title by a federal reservation or withdrawal under navigable waters, such reservations were at least contemplated in *Utah Lake*. The court holds that Congress may reserve submerged land to itself and defeat a future state's title to such land, pursuant

⁴¹ *Utah Lake* was a 5-4 decision. The dissent was made up of Justices White, Brennan, Marshall, and Stevens.

to the Property Clause of the Constitution, so long as the reservation meets the two-part *Utah Lake* test. Having so decided, the court must now apply *Utah Lake* to PLO 82.

The court begins this portion of its analysis with the strong presumption that the State of Alaska, pursuant to the equal footing doctrine and the SLA, took title to submerged lands in Alaska.

The first question for resolution is whether Congress clearly intended to reserve the submerged lands in PLO 82. *Utah Lake*, 482 U.S. at 202. Clear intent is established upon a showing that Congress "definitely declared or otherwise made very plain" an intent to reserve the submerged lands. *Id.* at 207 (citations and internal quotations omitted).

As previously noted, PLO 82 withdrew "all public lands" in northern Alaska "from sale, location, selection, and entry under the public land laws of the United States, including the mining laws, and from leasing under the mineral-leasing laws" PLO 82; 8 Fed. Reg. 1599. Additionally, the minerals of PLO 82 were reserved "for use in connection with the prosecution of the war." *Id.*

The meaning of "public lands" as referenced in PLO 82 is disputed by the parties. The State of Alaska argues that "public lands" has been consistently defined as lands subject to sale or other disposal under general laws, unless other meaning is clear from the legislation. See *Utah Lake*, 482 U.S. at 206 ("Most enduringly, the *public lands* have been defined as those lands subject to sale or other disposal under the general land laws.") (citation omitted); *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 17 (1935) ("the term 'public lands' [does] not include tidelands") (citation omitted); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *Barker v. Hardey*, 181 U.S. 481 (1901); *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894) ("It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands."); *Newhall v. Sanger*, 92 U.S. 761, 763 (1875) ("The words 'public lands' are habitually used in our

legislation to describe such as are subject to sale or other disposal under general laws."').⁴² The State of Alaska argues that tidelands and inland submerged lands are not subject to sale or other disposal under the general laws and, therefore, are not "public lands." Accordingly, the State of Alaska argues that to interpret "public lands" as including submerged land, absent clearly expressed intent to do so, would violate the equal footing doctrine.

The United States argues that the technical meaning of "public lands" is irrelevant. Rather, the United States argues, the meaning of "public lands" must be determined by reference to the context within which the term is used. According to the United States, the important consideration is the meaning of "public lands" as used in PLO 82. The United States refers to *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), in which the Supreme Court held that the statutory authority of the Secretary of the Interior to withdraw "public lands" as reservations for Alaska Natives included the authority to reserve adjacent submerged lands. Similarly, in *Alaska Pac. Fisheries*, 248 U.S. at 89, the court, in considering whether "the body of lands known as the Annette Islands" included submerged lands, stated:

As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created — the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be attained.

⁴²In addition to the cited cases, the State of Alaska refers to various decisions by the DOI and the Department of Agriculture, and legal briefs filed by the United States in other litigation which state that tidelands are not public lands belonging to the United States. See State of Alaska's brief in support of motion at 32-35 (Clerk's Docket No. 94).

Id. 87. As noted above, the court concluded that, given the circumstances, the "body of lands" included submerged lands.

Finally, in *United States v. Alaska*, the court, in considering submerged lands within the Kenai Moose Range, stated:

In construing the pertinent Alaskan statutes, the courts have consistently held that the words "public domain", and public lands" and "land", include land under water. *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946), cert. denied, 330 U.S. 827 []; *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 ... (1918); *Hynes v. Grimes Packing Co.*, 337 U.S. 86 ... (1949).

United States v. Alaska, 423 F.2d at 766.

The court stated further that "one of the most important factors in resolving the meaning of the pertinent language is to place ourselves, insofar as possible, in the posture of the President and surround ourselves with the factual atmosphere in which the Kenai Moose Range was created." *Id.* at 766-67.

The court concludes that the meaning of the term "public lands" should be drawn from the context of the language of PLO 82 and the factual circumstances in existence at the time PLO 82 issued.⁴³

⁴³The dissent in *Utah Lake* contains a pertinent discussion on the meaning of "public lands."

The majority ... alights on the phrase "public lands." That phrase, according to the majority, means "lands subject to sale or other disposal under the general land laws." ... This interpretive approach is inconsistent with our recent opinion in *Amoco Production Co. v. Gambell*, 480 U.S. 531, 549, n.15 ... (1987), where we "reject[ed] the assertion that the phrase 'public lands,' in and of itself, has a precise meaning, without reference to a definitional section or its context in a statute." The most natural interpretation of "public lands" in this context is simply lands to which the Federal Government holds title. In *Choctaw Nation v. Oklahoma*,

The court will next consider whether "public lands," as used in PLO 82, included submerged lands.

The meaning of "public lands" in PLO 82 is dependent, in part, upon the purpose of PLO 82. The parties do not dispute that the purpose of PLO 82 was to preserve minerals for the prosecution of World War II. The sheer magnitude of that global conflict required all of the resources which the United States could muster. Moreover, at the time PLO 82 was issued in January of 1943, the war's duration was in doubt. Thus, a steady supply of oil was essential if the United States was to fight across two oceans and supply war resources to her allies. In short, a more extraordinary case of "international duty or public exigency" has never existed in American history. *Utah Lake*, 482 U.S. at 197.

PLO 82 did not need to specify "submerged lands" to make its intent clear. The lands were specifically withdrawn and "minerals in such lands" were specifically reserved "for use in connection with the prosecution of the war." 8 Fed Reg. 1599 (1943). Had PLO 82 not intended to include submerged lands, the reservation would have been nearly worthless. Water covers millions of acres of the North Slope, yet in 1943 it was unknown which water bodies were navigable and constituted submerged lands. Failure to withdraw submerged lands would have led to uncertainty regarding the withdrawal status of large portions of the North Slope.

Additionally, "oil is a fugacious mineral, the movements of which are not confined by the artificial boundaries of surface tracts [thus a] gap [exists] between the geological nature of the oil pool and the formal surface rights of the lessees ..." *Railroad Comm'n of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573, 579 (1940). Pursuant to the "rule of

397 U.S. 620, 633 ... (1970), for example, we stated that "the United States can dispose of lands underlying navigable waters just as it can dispose of other Public lands."

Utah Lake, 482 U.S. at 212 n.4 (White, J., dissenting).

capture" a lessee's interest is subject to "his neighbors' power to drain his oil away." *Id.* PLO 82's clear intent to reserve submerged land was established, in part, by the need for the United States to protect itself from another's capture rights.

The purpose of PLO 82 provides clear evidence that submerged lands were reserved. The manner in which the PLO 82 boundaries were drawn provides additional evidence that PLO 82 clearly intended to reserve submerged lands. The United States argues that PLO 82 was carefully drawn to include submerged lands within its boundaries, leaving no doubt as to the intention to include submerged lands. The Alaska Peninsula portion of the withdrawal, for example, specifically included Iliamna Lake, but excluded Lake Clark. Similar water boundaries mark the Katalla-Yakataga portion of the withdrawal. The United States argues that the care with which water boundaries were drawn leaves no doubt that PLO 82 was intended to include all submerged lands within its boundaries. The State of Alaska does not refute this argument. The fact that PLO 82 expressly included some water bodies and expressly excluded others is not instructive as to DOI intent with respect to all of the unnamed water bodies.

The parties dispute the significance of the Mineral Leasing Act (MLA), 41 Stat. 437 (1920), on PLO 82. The MLA was in effect in 1943 and permitted oil and gas leasing of:

[L]ands containing such deposits owned by the United States, including those in national forests, but excluding lands . . . known as the Appalachian Forest Act, and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes. . . .

41 Stat. 437; 30 U.S.C. § 181 (1920).

The United States argues that because the statute allowed leasing of lands owned by the United States, but did not

allow leasing on lands withdrawn for military and naval uses, considerable confusion existed as to the applicability of the MLA to submerged lands in territories. The State of Alaska argues that submerged lands were subject to the MLA, and that the Secretary of the Interior had discretion under the MLA to refuse to issue permits to prospect for oil. Thus, according to the State, PLO 82 did not need to protect submerged lands which the Secretary on Interior could protect by refusing to issue exploration permits. In response, the United States argues that in 1943 issuance of MLA leases was delegated to local land offices and local officials had issued leases to submerged lands.⁴⁴ Consequently, the United States argues, PLO 82 necessarily withdrew submerged lands to eliminate any confusion which may have existed regarding the propriety of leasing such lands.

The arguments regarding the MLA underscores the court's earlier discussion of the purpose of PLO 82 in protecting oil resources for the prosecution of World War II. At a minimum, there was uncertainty regarding the effect of the MLA on the submerged land of PLO 82. Given that the extent of the submerged lands in PLO 82 was unknown and the United States needed to protect vast oil resources for the war effort, it makes sense that PLO 82 would end the confusion and protect the resources by reserving all of the submerged lands of PLO 82.⁴⁵

⁴⁴ In the 1920s, permits were issued in the vicinity of Smith Bay. 86 Interior Dec. at 167. By 1938, all tidelands throughout the Alaska territory had been opened for precious mineral mining. 52 Stat. 588 (1938).

⁴⁵ In a November 20, 1942 memorandum, the commissioner of the General Land Office, Department of Interior, described the private interest in the PLO 82 regions:

There are in the areas described in the proposed order approximately 360 patented entries embracing about 3,000 acres, 64 oil and gas leases embracing approximately 137,006 acres, and about 105 oil and gas lease applications embracing approximately 84,000

The court concludes that the term "public lands" in PLO 82 can be defined according to context and factual circumstances. Here, the context and factual circumstances, as discussed above, indicate that "public lands" in PLO 82 included submerged lands. In plain and simple terms, there was a war on, and the United States had an extraordinary need to protect all resources within its power. The stated purpose of PLO 82 alone "made [it] very plain" that PLO 82 "clearly intended" to include submerged land. *Utah Lake*, 482 U.S. at 202. The purpose, combined with the other issues discussed above, establishes that PLO 82 clearly intended to include navigable water.

Since the court has found that the Secretary of the Department of the Interior issued PLO 82 with the intent to include submerged lands, the court must still determine whether the Secretary may be considered to have spoken for Congress in expressing the intent of PLO 82. *Utah Lake*, 482 U.S. at 202. PLO 82 was an Executive withdrawal issued by the Secretary of the Interior pursuant to a delegation of authority by President Franklin D. Roosevelt. The *Utah Lake* test, however, refers to the intent of Congress,⁴⁶ not the Executive.

In *United States v. Midwest Oil Co.* 236 U.S. 459 (1915), the Supreme Court recognized that Congress "has a legislative power over the public domain" and that the Executive Branch, as Congress' agent "was in charge of the public domain". *Id.* at 474, 475. Thus, the Executive Branch acts as the agent for Congress in exercising constitutional authority over the public domain. *Id.* at 475. *Midwest Oil* held that

acres. If and when this order is signed the lease applications will be rejected.

Attached as Exhibit B to the Krulitz opinion, 86 Interior Dec. 151.

⁴⁶ The Supreme Court so says in *Utah Lake*, even though *Utah Lake* was in fact withdrawn from public domain by the United States Geological Service, *albeit* pursuant to an express act of Congress. PLO 82 was not authorized by a specific congressional enabling act.

the Executive Branch had authority to withdraw land as an oil and gas reserve because Congress had acquiesced in the long history of Executive management of public lands.

The State of Alaska argues, without definitive supporting case law, that Congress has never acquiesced in the withdrawal of submerged lands. Yet, in *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 80 (1918), the Supreme Court rejected the appellant's attempt to distinguish *Midwest Oil* and appellant's argument that the President lacked authority to reserve submerged lands.⁴⁷ *Alaska Pac. Fisheries* affirmed the lower court's decision which specifically recognized that the President may "reserve public lands and adjacent waters for useful purposes without being authorized to do so by express statute. 240 F. 274, 280 (9th Cir. 1917) (emphasis added).⁴⁸ See also *United States v. Alaska*, 423 F.2d 764 (9th Cir.), 400 U.S. 967 (1970), which recognized that the Executive had the authority "prior to Alaskan statehood to withhold, withdraw or convey the land and water for any valid purpose." *Id.* at 766. In *United States v. Alaska*, the court recognized the validity of a withdrawal by President

⁴⁷ Appellant in *Alaska Pac. Fisheries* argued:

This [situation] is quite different from a withdrawal from entry of public land. *United States v. Midwest Oil Co.* 236 U.S. 459. The Constitution nowhere confers upon the President any special power respecting navigable waters or fisheries; and the common law, in the light of which the Constitution must be considered, recognized no such right in the King. The fisheries in the navigable waters belong to the people at large. The Government has no interest therein which it can reserve for the use of any individual or class. The President cannot include such waters in an Indian reservation. *United States v. Ashton*, 170 Fed. Rep. 509.

Alaska Pac. Fisheries 248 U.S. at 80.

⁴⁸ The Ninth Circuit followed this proposition with a discussion of *Midwest Oil*. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949), referenced both *Alaska Pac. Fisheries* and *Midwest Oil* in discussing the Secretary's authority to withdraw submerged land pursuant to an Executive order.

Roosevelt of lands underlying inland navigable water in the Kenai National Moose Range as a wildlife refuge in Executive Order 8979 pursuant to "the authority vested in me as President of the United States..." *Id.* at 765 (citation omitted). Accordingly, the Secretary of the Interior had the power to withdraw submerged lands of PLO 82.⁴⁹

For the above stated reasons, the court concludes that Congress acquiesced in the withdrawal of the submerged lands in PLO 82. Furthermore, Congress, through the Executive Branch as its agent, expressed a clear intent to reserve the submerged lands of PLO 82 as a matter of international duty and public exigency. Accordingly, the court concludes that the United States has satisfied the first prong of the *Utah Lake* test. The court will next consider the second prong, whether Congress affirmatively intended to defeat Alaska's title to the submerged land of PLO 82.

At this point, it is worthwhile to quote at length a conclusion reached in the Sansonetti Opinion:

Applying the second prong of the *Utah Lake* test to the withdrawal in 1943, had statehood been imminent, I would conclude as a necessary inference flowing from the purpose of the withdrawal, that inland submerged

⁴⁹The State of Alaska states that in 1983, the Ninth Circuit found that *Midwest Oil's* theory that a long and continuous practice is entitled to a presumption of validity, no longer represents the thinking of the Supreme Court. *United States v. Woodley*, 726 F.2d 1337 (9th Cir. 1983). The *Woodley* opinion, however, was withdrawn (732 F.2d 111 (9th Cir. 1984)), and a second *Woodley* opinion stated "[t]he United States Supreme Court has made clear that considerable weight is to be given to an unbroken practice, which has prevailed since the inception of our nation and was acquiesced in by the Framers of the Constitution when they were participating in public affairs." *United States v. Woodley*, 751 F.2d 1008, 1012 (9th Cir. 1985). The Ninth Circuit stated that the above principle was reaffirmed in *INS v. Chada*, 462 U.S. 919 (1983), and *Marsh v. Chambers*, 463 U.S. 783 (1983). In any event, congressional reservation of submerged land, so long as it satisfies the *Utah Lake* test, is not contrary to the Constitution.

lands were intended to be retained in federal ownership. However, no petitions seeking statehood were pending before Congress when PLO 82 was issued on January 3, 1943. In fact, only one statehood bill had even been introduced in Congress up to that time — in 1916, some twenty-seven years before the issuance of PLO 82. A thorough review of the Departmental files from this period found at the National Archives has been conducted. The review has produced no evidence to suggest that Acting Secretary Fortas had even considered the effect of this withdrawal on the title to submerged lands upon future statehood, let alone formulated an intent to defeat the future state's title to submerged lands located therein. Thus, the second prong of the *Utah Lake* test had not been met as of the date of the original withdrawal.

Because the second prong of this test was not met at the time PLO 82 was issued, and with the termination of World War II upon which the original withdrawal was grounded, it is necessary to determine whether the Executive, Congress, or both, subsequently formulated a clear intent to withhold the submerged lands within this withdrawal from a future state.

Sansonetti Opinion at 34-35 (footnotes omitted).

The parties do not dispute that intent to defeat state title to the submerged lands in PLO 82 cannot be established at the time of the PLO 82 withdrawal. The court concludes that when PLO 82 issued in 1943, neither Congress nor the Executive expressed an intent to defeat State title to submerged land within PLO 82. Congress' failure to express intent to defeat State title in 1943 raises an issue which neither the Sansonetti Opinion nor the parties discussed: whether Congress' intent to defeat State title must be expressed contemporaneously with congressional intent to reserve submerged lands.

Utah Lake does not specifically address this issue, but did consider events, such as the 1890 Act, which occurred subsequent to the initial "reservation" of the bed of Utah Lake. Moreover, in *Choctaw*, the only case in which the Supreme Court has "concluded that Congress intended to grant sovereign lands to a private party" (*Utah Lake*, 482 U.S. at 198), the Court considered events which ranged from the end of the Revolutionary War through Oklahoma statehood in 1906. *Choctaw*, 397 U.S. at 622-627. This court concludes that congressional intent to defeat state title to submerged lands may be determined from events occurring subsequent to the issuance of PLO 82.

The subsequent events in question center around the Alaska Statehood Act through which the United States argues Congress expressed clear intent to defeat state title to the submerged lands of PLO 82. As an initial matter, the State of Alaska argues that Congress cannot retain submerged land as a condition of statehood, as this would violate the equal footing doctrine.

Section 4 of the ASA provides in part:

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States

According to the Sansonetti Opinion, section 4 of the ASA makes clear that Alaska statehood was conditioned upon disclaiming right and title to lands not granted or confirmed in the ASA. Sansonetti Opinion at 57. The State of Alaska argues that Congress cannot use a statehood compact to grant a state less than full sovereign rights.

In support of its argument, the State of Alaska refers to *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845), in which the issue was whether a federal patent, issued after Alabama's admission to the Union, could validly convey submerged

lands within Alabama's boundaries. The plaintiff argued that Alabama did not take title to submerged lands at statehood because the statehood act provided that all navigable waters shall forever "remain public highways, free to the citizens of the said State, and of the United States" *Id.* at 229. The Court rejected plaintiff's argument, stating that "Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding." *Id.* The Court concluded, pursuant to the equal footing doctrine, that:

[T]o Alabama belong the navigable waters, and soils under them . . . and no compact that might be made between her and the United States could diminish or enlarge these rights.

Id.

In *Corvallis Sand & Gravel*, 429 U.S. 363 (1977), the Supreme Court stated that *Pollard's Lessee* "established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party [after statehood] was capable of defeating." *Corvallis Sand & Gravel*, 429 U.S. at 374 (footnote omitted).

Pollard's Lessee and *Corvallis Sand & Gravel* are not applicable to the case at bar because they did not involve a congressional conveyance or reservation of land prior to statehood.⁵⁰ *Choctaw*, however, is applicable. In *Choctaw*,

⁵⁰*Pollard's Lessee* was premised on the now faulty principle that the equal footing doctrine absolutely prohibited Congress from taking any steps to defeat a prospective State's title to submerged land. *Shively* "disavowed the dicta in *Pollard's Lessee*, and held that the Federal Government had the power, under the Property Clause, to convey such land to third parties . . ." *Utah Lake*, 482 U.S. at 196. *Pollard's Lessee* remains viable to the extent recognized in *Corvallis Sand & Gravel* that Congress cannot defeat state title to submerged land after statehood, because "title . . . acquired by the State is absolute so far as any federal

the Supreme Court noted that Oklahoma was admitted to the Union "on an equal footing with the original States," conditioned on its disclaimer of all right and title to lands "owned or held by any Indian, tribe, nation." *Choctaw*, 397 U.S. at 627 (quoting Act of June 16, 1906, §§ 3, 4, 34 Stat. 270, 271). According to *Choctaw*, and contrary to the State of Alaska's argument, admission of a state into the Union can hinge upon the state's disclaimer of certain submerged land.

The State of Alaska cites *Coyle v. Oklahoma*, 221 U.S. 559 (1911), for the proposition that Congress may not impose conditions upon the entry of a state into the Union, if those conditions would be invalid and ineffective if enacted after the state was admitted. In *Coyle*, the Court addressed a provision in the Oklahoma Enabling Act which required that the state capital be temporarily located in Guthrie, Oklahoma. The Court held that the provision violated the equal footing doctrine because:

The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers.

Coyle, 221 U.S. at 565. *Coyle* further found that the power to locate a state capital was neither referable to any power granted to Congress nor implicit in the congressional power to admit new states. *Id.* at 574. Pursuant to the equal footing doctrine, the Oklahoma state legislature had the power to locate its own seat of government notwithstanding any contrary provisions in the state's enabling act.⁵¹

principle of land titles is concerned." *Corvallis Sand & Gravel*, 429 U.S. at 374 (emphasis added) (referring to the "rule laid down in *Pollard's Lessee*").

⁵¹ *Coyle* noted, however, that Congress probably had the power to enact Statehood acts with "regulations touching the sole care and

Coyle, like *Pollard's Lessee*, is inapplicable to the case at bar. Oklahoma was able to locate its state capital where it chose because selecting the location is "essentially and peculiarly [a] state power[]", *Coyle*, 221 U.S. at 565, and "referable to no power granted to Congress", *id.* at 574. Ownership of submerged lands, however, is not "essentially and peculiarly" a state power. Congress has the power to defeat state title to submerged lands, and that power is derived from the Constitution and not from any agreement or compact with a prospective state. The force of *Shively*, *Holt State Bank*, *Choctaw*, *Montana*, and *Utah Lake*, would be greatly diminished if Congress could not use statehood acts as a means to express clear intent to defeat state title to submerged lands. Congress has the power to defeat state title to submerged land, and that power may be exercised in the statehood act.

The next question is whether Congress did in fact clearly express its intent in the ASA to defeat state title to the submerged lands of PLO 82.

The United States argues that Congress adopted sections 10 and 11 of the ASA to alleviate concerns that statehood would negatively impact military activity in Alaska. The United States argues that because submerged lands pass to the new state *at the moment of statehood*, Congress used the phrase "immediately prior to the admission of said State" to clarify its intent to defeat state title to submerged lands held for military purposes. ASA § 11(b). The United States argues that the third proviso of section 11(b) is "exceedingly important" because "it ties exclusive jurisdiction to parcels owned by the United States." United States memorandum in support of cross-motion at 50.⁵² The United States also argues that sections 11(b) and 11(b)

disposition of the public lands or reservations therein ..." *Coyle*, 221 U.S. at 574.

⁵² Clerk's Docket No. 96.

(iii) cannot be read consistently with one another unless Congress intended to defeat state title to PLO 82 submerged lands. The United States argues further that if section 11(b) did not defeat state title to submerged lands for military purposes, then the submerged lands in every military facility in Alaska passed to Alaska at statehood. If that were the case, the United States argues, then Congress would have been required to compensate Alaska for military use of state-owned submerged lands within section 11(b) areas. However, the United States argues, Congress had no intention of paying such compensation and, therefore, defeated state title to the land.⁵³

The State of Alaska argues that section 11(b) addresses legislative jurisdiction, not title to submerged lands. The State of Alaska argues that the purpose of section 11(b) was to assure that the state would not impose laws inconsistent with the military functions of PLO 82. Thus, the State of Alaska argues, ASA section 11(b)(ii) provided that the State of Alaska and the United States would exercise concurrent jurisdiction over PLO 82. Regarding section 11(b)(iii), the State of Alaska argues that it was designed to limit section 11(b), not broaden it beyond the power of exclusive legislation.

Next, the State of Alaska argues that Congress did not defeat state title to submerged lands at statehood because such was not absolutely necessary to the purpose of PLO 82. The State of Alaska argues that if the United States were concerned about state interference in any military purpose

⁵³In further support of its argument, the United States references the comments of several individuals during hearings leading up to statehood. Senator Cordon stated "the petroleum reserve is a good reason not to grant the land in the area to the State of Alaska" and "[t]he reservation there is absolute." United States memorandum in support of cross-motion at 52 (Clerk's Docket No. 96) (citations omitted). Senator Smathers stated that "no company or individual can go in there." *Id.* at 51 (citation omitted).

for which PLO 82 was retained, those purposes were protected by SLA section 6(a). The United States argues, however, that section 6(a) merely restates the traditional rights the United States has in controlling navigation. Additionally, SLA section 6(b) requires Congress to pay for submerged lands if needed "[i]n time of war or when necessary for national defense . . ." 43 U.S.C. § 1314(b), but the United States argues that Congress had no intention of condemning the submerged lands of PLO 82 for military use.

The impact of the SLA on the ASA is interwoven throughout the parties' arguments and warrants further discussion. The SLA is made applicable to the ASA pursuant to section 6(m) of the ASA. The United States argues that section 11(b) of the ASA demonstrates that Congress intended to defeat state title to PLO 82 submerged lands and, therefore, demonstrates an express retention of submerged lands within the meaning of section 5(a) of the SLA. SLA section 5(a) provides an exception to the general principle of the SLA that title to submerged lands is to vest in the respective states.

The United States argues that section 11(b) of the ASA and section 5(a) of the SLA operate together in expressing Congress' intent to defeat state title to the submerged lands of PLO 82. The United States also argues that section 5(a) of the SLA operates in conjunction with section 4 of the ASA in establishing congressional intent on PLO 82 submerged lands. ASA section 4 states:

As a compact with the United States said State . . . forever disclaim[s] all right and title to *any lands or other property not granted or confirmed to the State under authority of this Act*, the right or title to which is held by the United States. . . . ASA § 4 (emphasis added).

The United States argues that the PLO 82 submerged lands were "expressly retained" under SLA section 5(a)

and not granted to the State of Alaska under ASA section 4. The State of Alaska argues that the SLA did not supersede the equal footing doctrine and that PLO 82 submerged lands passed to Alaska regardless of exceptions in the SLA. Therefore, the State of Alaska argues that congressional intent, whether stated in the ASA or the SLA, must still meet the *Utah Lake* test.

Section 5(a) of the SLA protects the United States' ownership of all lands expressly retained by the United States when a state enters the Union. The SLA, however, did not disturb the equal footing doctrine. In *Corvallis Sand & Gravel*, the Court stated:

[T]he Submerged Lands Act did not alter the scope or effect of the equal-footing doctrine, nor did it alter state property law regarding riparian ownership. The effect of the Act was merely to confirm the States' title to the beds of navigable waters within their boundaries as against any claim of the United States Government.

Corvallis Sand & Gravel, 429 U.S. at 371 n.4. Therefore, even land which is "expressly retained" under section 5(a) of the SLA is subject to the strong presumption against defeating state title to submerged land. Submerged lands subject to the "expressly retained" standard of section 5(a) are also subject to analysis under the "clearly intended" standard of *Utah Lake*.

The court concludes that the United States has not established that Congress "definitely declared or otherwise made very plain" its intent to defeat state title to PLO 82 submerged lands. *Utah Lake*, 482 U.S. at 197 (citation omitted). The undisputed fact that Congress, when promulgating PLO 82 in 1943, did not intend to defeat state title to submerged lands is convincing evidence that Congress never intended to defeat state title to such lands.

In 1958 when the ASA was under consideration (as well as in 1943 when PLO 82 was issued), Congress was aware

of both *Shively* and *Holt State Bank*, and the requirement of the equal footing doctrine that territorial submerged lands are held for the ultimate benefit of the future states. Congress was also aware that, in order to defeat state title, it must make such intent very plain. To avoid the equal footing doctrine, Congress must use "clear and especial words" (*Martin v. Waddell's Lessee*, 41 U.S. 367, 411 (1842)) which "embrace[] the lands under the waters of the stream" (*Packer v. Bird*, 137 U.S. 661, 672 (1891)). Section 6(m) of the ASA extends the SLA to the State of Alaska. The ASA does not expressly identify PLO 82 as an exception to the operation of section 6(m). This is the single most important piece of evidence that Congress never intended the ASA to defeat State title to PLO 82 submerged lands.³⁴ Like the 1888 Act in *Utah Lake*, "the broad sweep of [the ASA] cannot be reconciled with an intent to defeat the states' title to the land under navigable waters." *Utah Lake*, 482 U.S. at 208.

More generally, the court concludes that neither PLO 82, the ASA, nor the SLA, whether considered separately or together, contain the type of specific language which the Supreme Court requires if Congress is to overcome the equal footing doctrine and the strong presumption against defeating state title to submerged land. The single case in which the Supreme Court concluded that Congress intended to defeat State title to submerged land was *Choctaw*. In *Choctaw*, one of the treaties specifically stated that "no part of the land granted to them shall ever be embraced in any Territory or State." *Choctaw*, 397 U.S. at 635. *Choctaw*

³⁴In *Utah Lake*, the Court noted that the: "structure and history of the 1888 Act strongly suggests that Congress had no . . . intention [to defeat state title to submerged land]. On its face, the 1888 Act does not purport to defeat the entitlement of future States to any land reserved. [The] Act makes no mention of the State's entitlement to the beds of navigable rivers and lakes upon entry into statehood." *Utah Lake*, 482 U.S. at 208 (emphasis added).

demonstrates the type of specific language necessary to overcome the strong presumption against defeating state title to submerged lands. Here, it is undisputed that PLO 82 as promulgated was not intended to defeat State title to submerged lands in PLO 82. To draw the opposite conclusion from either the ASA or the SLA would be antithetical to the equal footing doctrine. Congress simply did not clearly state in the ASA that it intended to defeat the State of Alaska's title to PLO 82 submerged lands.⁵⁵

The court also notes that in 1958 PLO 1621, which opened the area west of NPR-4 (where the Kukpowruk River flows) to entries under the mining laws and issuance of mineral leases, and SLA section 6(b), which gives the United States the right of first refusal to purchase natural resources or to acquire submerged lands, emasculate the original purpose and need for PLO 82. PLO 1621 authorized leasing and development of some of these submerged lands, but the United States still had the right to acquire the oil under the SLA.

⁵⁵ Neither the PYK line (section 10 of the ASA) nor section 11(b) can fairly be read as a congressional reservation of title to any particular submerged land. Section 10 does not mention PLO 82 or submerged land, but merely establishes the potential that, someday, the President may order a special national defense withdrawal. The language of section 10 does not establish "clear intent" on the part of Congress to defeat state title to PLO 82 submerged land. Likewise, section 11(b) makes no mention of title to PLO 82 submerged lands. Rather, section 11(b) reserved exclusive legislative authority in the United States for military lands. The ASA must be read as a whole, in a fashion to give effect to all of its terms. The ASA provides that the principles of the equal footing doctrine and the terms of the SLA apply to the State of Alaska. Neither the equal footing doctrine nor the SLA may be defeated without a clear expression of intent on the part of Congress. ASA sections 10 and 11(b) do not provide clear statements of congressional intent that PLO 82 submerged lands should be exempted from the provisions of the equal footing doctrine or the SLA.

The United States argues that comments by certain senators and other individuals during the Alaska statehood debate provide evidence that Congress clearly intended to defeat state title to the submerged lands of PLO 82. Senator Cordon, for example, stated that "[t]he reservation there is absolute." United States' memorandum in support of cross-motion at 52⁵⁶ (citations omitted). Those portions of the statehood debate referenced by the United States very likely involved Congress' concerns regarding state selections from public lands in Alaska. As long as PLO 82 remained in force, the lands within that reservation could not be selected by the state under the land grant provision of the ASA.⁵⁷ The court finds nothing in the portions of the statehood debates referenced by the United States which suggests that Congress definitely declared an intent to defeat state title to submerged lands. The individuals engaged in the Alaska statehood debate simply did not mention the equal footing doctrine or congressional intent to defeat state title to the submerged lands of PLO 82.

The failure of Congress to make its intentions clear ends the court's inquiry. It is inappropriate for the court to engage in the type of speculation and conjecture advocated by the United States in attempting to explain the intent of Congress. The United States' speculative arguments if credited at all prove only one thing, that the ASA is subject to varying interpretations. As noted by the State of Alaska, in quoting *The Binghamton Bridge*, 70 U.S. at 51, 83 (1865):

[T]he fact that it required so ingenious and labored an argument by my learned brother, to vindicate such

⁵⁶ Clerk's Docket No. 96.

⁵⁷ The ASA, sections 6(a) and 6(b), authorized the State of Alaska to select over 100 million acres "from the public lands of the United States in Alaska which are vacant, unappropriated and unreserved at the time of their selection."

construction of the act [is], of itself, conclusive evidence that the construction should not be given to it.

Id.

The same is true in the case at bar. The United States' arguments are ingenious and labored, but they simply do not demonstrate a plain congressional intent to defeat state title to PLO 82 submerged lands. The United States' arguments require the court to work through layers of conjecture and draw numerous inferences, yet the court cannot "lightly infer a congressional intent to defeat a State's title to land under navigable waters" *Utah Lake*, 82 U.S. at 197.⁵⁸

The United States attaches talismanic significance to sections 11(b) and 11(b)(iii) of the ASA, yet these sections simply make no reference to lands beneath navigable waters in PLO 82. When considered in light of Congress' definite intent not to defeat state title to PLO 82 submerged lands in 1943, it is extraordinary to suggest that Congress expressed the opposite intent through the broad terms of section 11(b) and 11(b)(iii). This court concludes that the United States' concession that PLO 82 did not evince an intent to defeat state title to the submerged lands in question is the single most important piece of evidence for purposes of resolving this case. This evidence is dispositive of the case given the absence of a congressional act (or act of the DOI as agent for Congress), subsequent to PLO 82 but prior to

⁵⁸ For example, the United States argues that "Congressional intent to retain in federal ownership the submerged lands within defense withdrawals is very plain because the State's contrary interpretation would so clearly and seriously frustrate congressional intent in § 11(b)." United States' reply at 23. This argument, of course, begs the question of what precisely was Congress' intent, and underscores the United States inability to point to "clear and especial" words which make very plain Congress' intent regarding PLO 82.

statehood, evincing the affirmative intent to defeat the future state's title to submerged lands.⁵⁹

The parties have devoted a substantial portion of their arguments to events which occurred after statehood. Particular significance is attached to PLO 2214, 25 Fed. Reg. 12,598 (Dec. 9, 1960), which established the Arctic National Wildlife Range, PLO 2213, 25 Fed. Reg. 12,597 (Dec. 9, 1960), which established the Kuskokwim National Wildlife Range, and PLO 2216, 25 Fed. Reg. 12,599 (Dec. 9, 1960), which established the Izembek National

⁵⁹ The parties dispute whether the court should give deference to the Krulitz and Sansonetti Opinions. When faced with the issue of statutory interpretation, such as the ASA or the SLA, the district court generally grants substantial deference to the interpretation of the agency charged with the statute's administration. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Id.*

The court declines to grant deference to the solicitors' opinions. Ultimately, both opinions purport to interpret the Alaska Statehood Act, yet the DOI is not charged with implementing or administering the ASA. Additionally, both opinions were issued years subsequent to the issue of PLO 82 in 1943, and neither opinion "involve[d] a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Id.* (internal quotation marks and citation omitted). Moreover, the Sansonetti Opinion was rendered in the course of this litigation, and must therefore be regarded as potentially an advocate's view.

The opinions are also not entitled to deference because they reached unreasonable conclusions based upon misapplication of the law regarding the equal footing doctrine. Finally, as argued by the State of Alaska and undisputed by the United States, the Supreme Court in *Utah Lake* applied a *de novo* standard of review in determining whether Congress clearly intended to reserve the bed of Utah Lake and defeat state title thereto. Deference to the Interior's position in *Utah Lake* would have resulted in a distinctly different conclusion. Granting deference to the solicitors' unreasonable opinions would eviscerate the equal footing doctrine.

Wildlife Range. Each of these land orders were filed on December 8, 1960. The public land orders establishing the Kuskokwim and Izembek National Wildlife Ranges expressly excluded "lands beneath navigable waters". However, the Public Land Order establishing ANWR contained no such exclusion. The United States argues that the differences between the language establishing the Kuskokwim and Izembek Wildlife Ranges on the one hand, and ANWR on the other, establish congressional intent to defeat state title to submerged lands in PLO 82. Yet none of the three public land orders mention the equal footing doctrine or state title to submerged lands. Even if the United States' argument were plausible, the State of Alaska offers the equally plausible argument that the public land orders establishing the Izembek and Kuskokwim Wildlife Ranges specifically excluded submerged lands because those wildlife ranges include ocean areas within their boundaries which are not managed by the United States. The boundaries of ANWR, however, do not include ocean boundaries. The above public land orders cannot change the original intent of PLO 82 and are unpersuasive with respect to the intent of the ASA. They do not evince a clear and unambiguous congressional intent to defeat state title to PLO-82 submerged lands.

If congressional intent regarding PLO 82 can be drawn from post-statehood events, perhaps the most critical event was Public Land Order 2215, 25 Fed. Reg. 12,599 (Dec. 9, 1960). PLO 2215, filed on the same date as the above three public land orders, revoked PLO 82. The fact that PLO 2215 made no mention of state title to submerged land is evidence that Congress never intended, either in 1943 or in 1960, to defeat state title to that land. In bringing Alaska into the Union "on an equal footing with the other states", ASA § 1, Congress complied with the "longstanding policy of holding land under navigable waters for the ultimate benefit of the State[.]" *Utah Lake*, 482 U.S. at 202.

Revocation of PLO 82 was a natural consequence of statehood, because title to the submerged land had already passed to the State of Alaska under the equal footing doctrine.⁶⁰ PLO 1621 had already opened some PLO 82 lands to mineral leasing, and the State of Alaska was entitled to make huge land selections under section 6(a) and (b) of the ASA from federal lands. The United States suggests that the totality of the circumstances provides sufficient evidence of congressional intent to defeat state title to PLO 82 submerged land. The United States' argument, however, ignores the requirements of *Shively*, *Holt State Bank*, *Choctaw*, *Montana*, and *Utah Lake*. Those cases establish the strong presumption against defeating the equal footing doctrine and require that the United States put forth clear and unambiguous evidence that Congress definitely declared or otherwise made very plain its intent to defeat state title to submerged land. Congressional defeat of state title to submerged lands "*should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.*" *Utah Lake*, 482 U.S. at 197 (citation omitted) (emphasis added). Here, the United States has weaved together numerous public land orders and acts of Congress, but none of them, taken separately or

⁶⁰Uncertainty regarding the meaning of post-statehood events is exemplified in a memorandum from the associate solicitor, Division of Public Lands, to the director of the Bureau of Land Management (attached as an exhibit, numbered 3122, to the State's reply brief; Clerk Is Docket No. 102). The memorandum states: "As you are aware, upon the admission of Alaska title to the beds of all navigable waters within the State vested in it and are held by virtue of its sovereignty." M-36596, March 15, 1960 (emphasis added). The United States argues that this definitive statement should be discounted because the deputy solicitor, who outranks the associate solicitor, had left open the possibility that pre-statehood withdrawals might defeat state title. If the United States is correct, a mere "possibility" that pre-statehood withdrawals acted to defeat state title to submerged lands in PLO 82 hardly establishes that Congress affirmatively intended to defeat state title to such land.

together, meet the level of specificity required by *Utah Lake*. The United States has made a conjectural case for what Congress might have intended. Yet nowhere in the enormous record can the court find the "clear and especial words", such as those found in *Choctaw*, which make very plain a congressional intent to defeat state title to PLO 82 submerged lands. *Id.* at 198 (citation omitted). At best, the United States' arguments establish confusion, not certainty, regarding the status of PLO 82 submerged lands. The court simply "must not infer" without definite, clear, and plain terms that "embrace[] the land under waters" that Congress intended to defeat state title to submerged lands. *Id.* at 198 (citation omitted). The evidence is insufficient for the court to make such an inference here.

As stated in *Montana*:

The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance.

Montana, 450 U.S. at 554. Here, as in *Montana*, there is no express reference in PLO 82, the ASA, or the SLA, that Congress intended to defeat title to PLO 82 submerged land.⁶¹ In *Choctaw*, the Court "placed special emphasis on the Government's promise that the reserved lands would never become part of any State." *Id.* at 555 n.5. Here, not only is the record devoid of the clear evidence of intent to defeat state title, it is also undisputed that in 1943, when PLO 82 issued, there was absolutely no intent on the part of

Congress to defeat the future state's title to PLO 82 submerged lands.

Even if the court had concluded that Congress did intend to defeat title to the submerged lands of PLO 82, the court believes that revocation of PLO 82 resulted in the submerged lands passing to the State of Alaska. The single most important reason why it is constitutional for the United States to reserve land to itself is so that it can hold the land for the ultimate benefit of the future state. Simply because the event of statehood may pass without automatic transfer of title of submerged lands to the state does not mean that the land is no longer held for the ultimate benefit of the state. As stated in the dissent in *Utah Lake*, "submerged lands retain their sovereign status . . . [a]nd if Congress later determines that the lands are no longer needed by the Federal Government for a public purpose, it can at that time transfer title to the State." *Utah Lake*, 482 U.S. at 210 (White, J. dissenting) (citation omitted). The United States cannot, however, transfer title to the submerged lands to private entities or individuals. *Shively* concluded that submerged lands held in trust by the United States "shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State" *Shively*, 152 U.S. at 50. Thus, with revocation of PLO 82, section 3 of the SLA effected transfer of title to the released submerged lands to the state. 43 U.S.C. § 1311. The principles of the equal footing doctrine did not end at statehood, but were held in abeyance until the United States determined that it no longer needed the PLO 82 lands. At that point the submerged lands, which could then only be held for the ultimate benefit of the State of Alaska, passed to the state. For the above stated reasons, the court finds that title to the lands beneath the waters of the Kukpowruk River, if navigable, passed to the State of Alaska at statehood pursuant to the equal footing doctrine.

⁶¹ This case is also similar to *Holt State Bank*, in that there is nothing in the evidence which evinces "a purpose to depart from the established policy . . . of treating such lands as held for the benefit of the future State." *Holt State Bank*, 270 U.S. at 58-59.

Alternatively, title so passed upon revocation of PLO 82 in 1960. The State of Alaska's motion for partial summary judgment is granted. The United States' cross-motion for partial summary judgment is denied.⁶²

DATED at Anchorage, Alaska, this 29 day of March, 1996.

/S/

H. Russel Holland, Judge
District of Alaska

⁶² The court has considered the briefs filed by the ASRC and Cully Corporation. Where relevant, their arguments have been incorporated into the court's consideration of the cross-motions for summary judgment. The ASRC argues that the State of Alaska has, over the years, conceded the United States' position that the State did not own submerged lands in PLO 82. The argument is irrelevant and was effectively rebutted by the State of Alaska with reference to several documents entitled "Notice of State of Alaska's Ownership of Submerged Lands." (See documents numbered 3015-33, attached as an exhibit to the State's reply brief; Clerk's Docket No. 102). These notices, dated in the late 1970s, contained language clearly cautioning the ASRC that the State of Alaska did not believe that the United States had title to convey.